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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 33

NORTHWEST AIRLINES, INC., PETITIONER,

vs.

STATE OF MINNESOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR CERTIORARI FILED JUNE 8, 1953.

CERTIORARI GRANTED OCTOBER 12, 1953.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

NORTHWEST AIRLINES, INC., PETITIONER,

vs.

THE STATE OF MINNESOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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[fol. 1]

IN DISTRICT COURT OF RAMSEY COUNTY

THE STATE OF MINNESOTA, Plaintiff,

vs.

NORTHWEST AIRLINES, INC., a Corporation, Defendant

CITATION

The State of Minnesota to the Defendant Above Named:

Whereas, The County Auditor of said County has, on the 16th Day of July, A. D. 1940, filed with the Clerk of said Court a copy of the duly revised list of delinquent taxes upon personal property, for the year 1939, according to the provisions of the statutes in such cases made and provided.

And Whereas, The sum of $22,498.56 including penalty provided by law, appears upon said copy of the revised list as the taxes duly assessed against you, for personal prop-
[fol. 2] erty, for the year 1939, and that the same are due and delinquent, you are hereby cited to be and appear before the District Court aforesaid, at the next general term of said Court, commencing on the 7th day of October, A. D. 1940, at 10 o'clock in the forenoon of that day, at the Court House in the City of St. Paul, in said County, then and there to show cause, if any there be, why you should not pay such taxes and penalty, and if you shall fail to pay said taxes, penalty and all the accrued costs thereon to the Sheriff of said Ramsey County, before the first day of said term of Court, or upon said first day of said term fail to show sufficient cause for said non-payment of said taxes, and all costs as aforesaid, judgment will be entered against you for said amount of said taxes, together with costs as aforesaid and disbursements.

Witness, the Honorable Hugo O. Hanft, Judge of said Court, and the seal of said Court, at St. Paul, in said County this 25th day of July, 1940.

N. C. Robinson, Clerk, by C. E. Ralph, Deputy Clerk.

Make remittances to T. J. Gibbons, Sheriff.

[fol. 3] IN DISTRICT COURT OF RAMSEY COUNTY

ANSWER

Comes now Northwest Airlines, Inc., defendant above named, and for its answer to the citation hitherto issued in the above entitled proceedings respectfully shows to the Court that:

I

The defendant is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business at Saint Paul Municipal Airport, Saint Paul, Minnesota.

The citation of Thomas J. Gibbons, Sheriff of Ramsey County, Minnesota, dated May 15, 1940, and bearing number 6550, was served upon the defendant on May 16, 1940.

III

The sum demanded is Twenty-three Thousand Six Hundred Twenty-three and 74/100 Dollars ($23,623.74) as taxes and penalty for the year 1939 upon personal property of the defendant claimed to be located at the Municipal Airport [fol. 4] in the City of Saint Paul, County of Ramsey and State of Minnesota.

IV

Defendant is informed and verily believes said assessment was based in part at least upon the full value of defendant's entire fleet of aircraft, even though not physically present in Ramsey County on May 1, 1939, upon the theory that all of said aircraft are taxable in full at Saint Paul as their home port.

V

Defendant is engaged in the business of carrying mail, passengers and freight for hire in interstate commerce, and operates aircraft on regular schedules between Chicago, Illinois, and Seattle, Washington, and Portland, Oregon, via Milwaukee and Madison, Wisconsin, Rochester, Saint Paul and Minneapolis, Minnesota, Fargo and Bismarck-Mandan, North Dakota, Miles City, Billings, Butte, Helena and Missoula, Montana, and Spokane, Wenatchee and Yakima, Washington. Defendant also operates regular scheduled flights between Fargo, North Dakota, and Winnipeg,

Manitoba. On May 1, 1939, the defendant was making no scheduled stops at Saint Paul. Since June 1, 1940, the de-
[fol. 5] fendant has been operating aircraft on regular schedules between Minneapolis and Duluth, Minnesota.

VI

Defendant maintains an overhaul base at Saint Paul, Minnesota, and operates maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle, Washington; at which points important service and maintenance work and minor and emergency repairs are made. At these points aircraft are kept for originating flights or for changing ships on through flights. The defendant also maintains ground crews at various points along its lines, and leases or owns hangers at various points.

VII

All of defendant's said aircraft are integral parts of its said interstate operations; and are necessary instrumentalities thereof; all of said aircraft are continuously engaged in flying from state to state in the course of defendant's said operations, except for brief stops at airports in the course of scheduled flights and except for occasional lay-ups for repairs or overhauling. The said aircraft have no fixed situs, and their location is constantly shifting from
[fol. 6] one county to another and from one state to another. On May 1, 1939, there were present during part or all of the day in Ramsey County only one Electra, one Zephyr and one Stinson airplane belonging to the defendant.

VIII

For the year 1939 the defendant paid taxes on said aircraft, or on a proportionate valuation thereof, in the States of Illinois, Minnesota, North Dakota, Montana, Oregon and Washington.

IX

Defendant alleges that the levy and assessment of a personal property tax against said aircraft, or any part thereof, would be in violation of the following sections of the Constitution of the State of Minnesota:

1. Article 1, Section 2, in respect of the provision thereof that "no member of this state shall be * * * deprived

of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers";

2. Article 1, Section 7, in respect of the provision thereof that "no person shall be deprived of life, liberty, or property without due process of law";

[fol. 7] 3. Article 4, Section 34, in respect of the provision thereof that all general laws "shall be uniform in their operation throughout the state"; and

4. Article 9, Section 1, in respect of the provision thereof that "taxes shall be uniform upon the same class of subjects."

X

Defendant further alleges that the levy and assessment of personal property taxes against said aircraft, or any of the same, are in violation of Article I, Section 8, of the Constitution of the United States in respect of the provision that "the Congress shall have power * * * to regulate commerce with foreign nations, and among the several states," and also in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States in respect of the provision that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 8] XI

Defendant alleges that the City of Saint Paul, the County of Ramsey and the State of Minnesota are each and all without jurisdiction to levy a personal property tax upon said aircraft, or any part of the same, and that the levy of said tax upon said aircraft or any part of the same constitutes an unlawful burden upon the interstate commerce conducted by the defendant.

XII

Defendant further alleges that even if said aircraft were taxable in part by said County of Ramsey as of May 1, 1939, the valuation placed upon said aircraft and the proportion-

ate basis upon which they were taxed were wholly excessive and grossly arbitrary.

Wherefore, defendant prays that it have judgment that it owes plaintiff nothing upon the assessment above set forth, and that defendant have its costs and disbursements herein.

Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for defendant, E-1006 First Natl. Bk. Bldg., Saint Paul, Minnesota.

Duly sworn to by E. I. Whyatt. Jurat omitted in printing.

[fol. 9] IN DISTRICT COURT OF RAMSEY COUNTY

AMENDED STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto and their respective counsel that the following facts may be taken as true for purposes of the above entitled case:

[fol. 10] I

The defendant is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business at Saint Paul Municipal Airport, Saint Paul, Minnesota.

II

The defendant is engaged in the business of carrying persons, property and mail for hire in interstate commerce and operates aircraft on regular schedules between the City of Chicago in the State of Illinois and the City of Seattle in the State of Washington and the City of Portland in the State of Oregon via the Cities of Milwaukee and Madison in the State of Wisconsin; the Cities of Rochester, St. Paul and Minneapolis in the State of Minnesota; the Cities of Fargo and Bismarck-Mandan in the State of North Dakota; the Cities of Miles City, Billings, Butte, Helena and Missoula in the State of Montana and the Cities of Spokane, Wenatchee and Yakima in the State of Washington. The defendant also operates regular scheduled flights between the City of Fargo, North Dakota and the City of Winnipeg in the Province of Manitoba, connecting with its transcon-

tinental flights. The defendant also operates regular scheduled flights between the City of Minneapolis in the State [fol. 11] of Minnesota and the City of Chicago in the State of Illinois. On May 1, 1939, the defendant was making no scheduled stops in the City of St. Paul.

III

On May 1, 1939, the defendant maintained its airplane and engine overhaul base at St. Paul, Minnesota, at which principal repairs to its engines and planes were made; and also maintained a hangar at said airport.

IV

On May 1, 1939, the defendant maintained and operated maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle, Washington, at which points service and maintenance work were performed. These service and maintenance stations each included a hangar, a crew of licensed mechanics, each in charge of a foreman, a complete set of maintenance tools, such as drill presses, hoists, fuel supply equipment, welding equipment, trucks, tractors, battery carts and cleaning equipment and a complete stock room of parts and supplies. All work on defendant's aircraft, with the exception of rebuilding and overhauling the same, was performed at these maintenance stations.
[fol. 12] At all its stops, including its maintenance bases, the defendant did on May 1, 1939, maintain a radio operator and a station manager, except that there was no radio operator or dispatcher at St. Paul. At a number of its stops the defendant also maintained baggage handlers, ticket sellers and information clerks, dispatchers and other employees.

At all its stops the defendant either owned or leased buildings for housing whatever operations it conducted at that particular point.

The defendant owned hangars at Chicago, Illinois, and Fargo, North Dakota. The defendant leased hangars at Minneapolis and St. Paul, Minnesota, Billings and Miles City, Montana, Spokane and Seattle, Washington. At Milwaukee and Madison, Wisconsin, Rochester and Duluth, Minnesota, Bismarck, North Dakota, Butte, Missoula and Helena, Montana, and Yakima and Wenatchee, Washington,

the defendant owned or leased offices and other space at the respective airports for its activities.

The defendant's flight crews, including pilots, copilots and stewardesses, had their bases, that is to say they began and ended their runs for the defendant, at the following points:

Chicago-Billings run—Minneapolis, Minnesota.

Fargo-Winnipeg run—Fargo, North Daktoa. (No stewardesses on this run.)

[fol. 13] Billings-Seattle run—Seattle, Washington.

Spokane-Portland run—Portland, Oregon and Spokane, Washington.

On May 1, 1939, none of the defendant's flight crews had their base at St. Paul.

V

The defendant's routes from Chicago to Seattle and Portland and from Fargo to Winnipeg were fixed and followed along their entire length a series of radio range courses which were operated day and night by the Civil Aeronautics Authority, these ranges being placed at regular intervals along the routes and being so situated as to mark a continuous course of travel. Along defendant's entire route there were also emergency landing fields at regular intervals which were maintained by the Civil Aeronautics Authority. Whenever the occasion requires due to weather conditions, it may be necessary to abandon the regular route of travel and follow another course for short intervals.

VI

The airplanes owned and operated by defendant were constantly changing from place to place along defendant's routes. All of said aircraft were continuously engaged in [fol. 14] flying from state to state in the course of defendant's operations, except for brief stops at the airports in the course of scheduled flights and except for occasional layups for repairs or overhauling. The location of said aircraft was constantly shifting from one county to another and from one state to another.

VII

All of defendant's airplanes were in Minnesota from time to time during the year 1939 carrying passengers,

property and the mails and for the purpose of periodical overhauling. On May 1, 1939, there were present in the State of Minnesota for at least part of the day the following listed airplanes belonging to the defendant and constituting a part of its entire fleet, the time of arrival, time of departure, and total time present at the respective airports being as follows:

[fol. 15]

No. of Ship	Time In	Time Out	Total Time at Port
MINNEAPOLIS			
NC 17387 Zephyr 14H	12:03 A. M.	6:55 A. M.	
	3:36 P. M.	....	15 hrs. 76 min.
NC 18994 " "	....	12:30 A. M.	
	8:35 P. M.	8:55 P. M.	50 min.
NC 14907 Lockheed 10A	6:35 A. M.	3:55 P. M.	9 hrs. 20 min.
NC 17392 Zephyr 14H	8:15 A. M.	6:00 P. M.	9 hrs. 45 min.
NC 14263 Lockheed 10A	8:19 A. M.	8:39 A. M.	20 min.
NC 21713 Douglas DC-3	....	11:21 A. M.	11 hrs. 21 min.
NC 21711 " "	10:10 A. M.	1:30 P. M.	
	8:45 P. M.	9:14 P. M.	3 hrs. 49 min.
NC 21712 " "	10:55 A. M.	2:38 P. M.	
	8:25 P. M.	....	7 hrs. 18 min.
NC 14170 Stinson Reliant	....	....	24 hrs.
NC 17385 Zephyr 14H	....	....	24 hrs.
NC 14900 Lockhead 10A	....	....	24 hrs.
NC 14261 " "	....	....	24 hrs.
NC 14244 " "	....	....	24 hrs.
ROCHESTER			
NC 21711 Douglas DC-3	9:20 A. M.	9:35 A. M.	
	2:10 P. M.	2:15 P. M.	20 min.
NC 18994 Zephyr 14H	9:32 P. M.	9:43 P. M.	10 min.
ST. PAUL			
NC 14262 Lockheed 10A	....	....	24 hrs.
NC 17386 Zephyr 14H	....	....	24 hrs.

VIII

On May 1, 1939, the defendant's flight operations were subject to the jurisdiction of the United States Civil Aeronautics Authority and its flights were all made pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board. Its airplanes were all registered with the Authority with St. Paul as their home port.

[fol. 16]

IX

The defendant filed its return for 1939 and included therein airplanes of its fleet of the total true and full value of $77,000.00. Thereafter the Assessor of said Ramsey County duly made an additional assessment of omitted property consisting of planes then owned by the defendant as of May 1, 1939, at a true and full value of $630,000.00; except that

it is agreed that the actual true and full value of said omitted property on said last mentioned date was the sum of $511,500.00;.and except further that the defendant contends that such property is taxable in Ramsey County, Minnesota, only to the extent of 13% of the true and full value of the defendant's entire fleet of airplanes which was of the agreed value of $588,500.00 as more fully appears from Paragraph XII hereof. That said additional assessment was duly entered by the County Auditor on the assessment and tax books for the year 1939 but was not paid; that thereafter the list of all personal property taxes remaining delinquent on the first day of April, 1940, which included said additional assessment, was duly certified to and filed with the Clerk of the above named district court; that thereafter, said additional assessment still remaining delinquent, all proceedings required by law were duly taken, including the issuance of a citation to the above named defendant; and [fol. 17] that in response thereto said defendant filed its answer.

X

Pursuant to Section 2018 Mason's Minnesota Statutes, 1927, on the 18th day of March, 1940, the Commissioner of Taxation of the State of Minnesota duly made an order determining that the proper place of listing and assessment for taxation as of May 1, 1939, of certain of the defendant's airplanes which had been actually present in Hennepin County on May 1, 1939, was in Ramsey County.

XI

The defendant paid personal property taxes upon its airplane fleet in some proportion of its full value in the States of Illinois, Wisconsin, North Dakota, Montana, Oregon and Washington for the year 1939.

XII

The total length of the routes over which defendant was running scheduled flights on May 1, 1939, was 2,466 miles. The total length of the defendant's routes over which scheduled flights were maintained in the State of Minnesota on May 1, 1939, was 320.2 miles. The scheduled route mileage [fol. 18] in Minnesota on May 1, 1939, was 14% of the total scheduled route mileage. The scheduled plane mileage of defendant over all its routes on May 1, 1939, was 14,414

miles and the scheduled plane miles in Minnesota on May 1, 1939, was 2,348.4 miles. The proportion of the scheduled plane miles in Minnesota on May 1, 1939, to scheduled plane miles everywhere was 16%.

James F. Lynch and Andrew R. Bratter, Attorneys for Plaintiff. Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for Defendant.

* * * * * * *

[fol. 19] In District Court of Ramsey County

Findings of Fact, Conclusions of Law and Order for Judgment—October 4, 1941

The above-entitled matter came on regularly to be tried before the undersigned, one of the Judges of the above-named Court, on the 8th day of July, 1941, upon the agreement of counsel for the parties hereto to submit the case upon an agreed stipulation of facts. The State of Minnesota was represented by James F. Lynch, County Attorney of said Ramsey County, and Andrew R. Bratter, Assistant [fol. 20] County Attorney; and the defendant appeared by its attorneys Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell.

The action involves a tax levied and assessed by the County Auditor of said Ramsey County for the year 1939 upon the fleet of airplanes operated by the defendant.

The parties having filed an agreed stipulation of facts, the matter having been argued orally before the Court and briefs having been filed, the Court makes the following

Findings of Fact

I

The defendant is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business at Saint Paul Municipal Airport, Saint Paul, Minnesota.

II

The defendant is engaged in the business of carrying persons, property and mail for hire in interstate commerce and operates aircraft on regular schedules between the City of Chicago in the State of Illinois and the City of

Seattle in the State of Washington and the City of Port-
[fol. 21] land in the State of Oregon via the Cities of Milwaukee and Madison in the State of Wisconsin; the Cities of Rochester, St. Paul and Minneapolis in the State of Minnesota; the Cities of Fargo and Bismarck-Mandan in the State of North Dakota; the Cities of Miles City, Billings, Butte, Helena and Missoula in the State of Montana and the Cities of Spokane, Wenatchee and Yakima in the State of Washington. The defendant also operates regular scheduled flights between the City of Fargo, North Dakota and the City of Winnipeg in the province of Manitoba, connecting with its transcontinental flights. The defendant also operates regular scheduled flights between the City of Minneapolis in the State of Minnesota and the City of Chicago in the State of Illinois. On May 1, 1939, the defendant was making no scheduled stops in the City of St. Paul.

III

On May 1, 1939, the defendant maintained its airplane and engine overhaul base at St. Paul, Minnesota, at which principal repairs to its engines and planes were made; and also maintained a hangar at said airport.

[fol. 22] IV

On May 1, 1939, the defendant maintained and operated maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle, Washington, at which points it maintained a crew of mechanics and tools and equipment for service and maintenance work. All the work on the defendant's aircraft, with the exception of rebuilding and overhauling the same, was performed at these maintenance stations.

At all its stops, including its maintenance bases, the defendant did on May 1, 1939, maintain a radio operator and a station manager, except that there was no radio operator or dispatcher at St. Paul. At a number of its stops the defendant also maintained baggage handlers, ticket sellers and information clerks, dispatchers and other employees.

At all its stops the defendant either owned or leased buildings for housing whatever operations it conducted at that particular point.

The defendant owned or leased hangars and office space at the several ports at which its planes landed.

The defendant's flight crews, including pilots, co-pilots and stewardesses, had their bases, that is to say they began and ended their runs for the defendant, at the following points:

[fol. 23] Chicago-Billings run—Minneapolis, Minnesota.

Fargo-Winnipeg run—Fargo, North Dakota. (No stewardesses on this run)

Billings-Seattle run—Seattle, Washington.

Spokane-Portland run—Portland, Oregon and Spokane, Washington.

On May 1, 1939, none of the defendant's flight crews had their base at St. Paul.

V

The defendant's routes from Chicago to Seattle and Portland and from Fargo to Winnipeg were fixed and followed along their entire length a series of radio range courses which were operated day and night by the Civil Aeronautics Authority, these ranges being placed at regular intervals along the routes and being so situated as to mark a continuous course of travel. Along defendant's entire route there were also emergency landing fields at regular intervals which were maintained by the Civil Aeronautics Authority. Whenever the occasion requires due to weather conditions, it may be necessary to abandon the regular route of travel and follow another course for short intervals.

[fol. 24] VI

The airplanes owned and operated by defendant were constantly changing from place to place along defendant's routes. All of said aircraft were continuously engaged in flying from state to state in the course of defendant's operations, except for brief stops at the airports in the course of scheduled flights and except for occasional layups for repairs or overhauling. The location of said aircraft was constantly shifting from one county to another and from one state to another.

VII

All of defendant's airplanes were in Minnesota from time to time during the year 1939 carrying passengers, property and the mails and for the purpose of periodical overhauling. On May 1, 1939, there were present in the State of Minnesota for at least part of the day the following

listed airplanes belonging to the defendant and constituting a part of its entire fleet, the time of arrival, time of departure, and total time present at the respective airports being as follows:

[fol. 25]

No. of Ship	Time In	Time Out	Total Time at Port
MINNEAPOLIS			
NC 17387 Zephyr 14H	12:03 A. M.	6:55 A. M.	
	3:36 P. M.	....	15 hrs. 76 min.
NC 18994 " "	....	12:30 A. M.	
	8:35 P. M.	8:55 P. M.	50 min.
NC 14907 Lockheed 10A	6:35 A. M.	3:55 P. M.	9 hrs. 20 min.
NC 17392 Zephyr 14H	8:15 A. M.	6:00 P. M.	9 hrs. 45 min.
NC 14263 Lockheed 10A	8:19 A. M.	8:39 A. M.	20 min.
NC 21713 Douglas DC-3	....	11:21 A. M.	11 hrs. 21 min.
NC 21711 " "	10:10 A. M.	1:30 P. M.	
	8:45 P. M.	9:14 P. M.	3 hrs. 49 min.
NC 21712 " "	10:55 A. M.	2:38 P. M.	
	8:25 P. M.	....	7 hrs. 18 min.
NC 14170 Stinson Reliant	....	....	24 hrs.
NC 17385 Zephyr 14H	....	....	24 hrs.
NC 14900 Lockhead 10A	....	....	24 hrs.
NC 14261 " "	....	....	24 hrs.
NC 14244 " "	....	....	24 hrs.
ROCHESTER			
NC 21711 Douglas DC-3	9:20 A. M.	9:35 A. M.	20 min.
	2:10 P. M.	2:15 P. M.	
NC 18994 Zephyr 14H	9:32 P. M.	9:42 P. M.	10 min.
ST. PAUL			
NC 14262 Lockheed 10A	....	....	24 hrs.
NC 17386 Zephyr 14H	....	....	24 hrs.

VIII

On May 1, 1939, the defendant's flight operations were subject to the jurisdiction of the United States Civil Aeronautics Authority and its flights were all made pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board. Its airplanes were all registered with the Authority with St. Paul as their home port.

[fol. 26]

IX

The defendant filed its return for the year 1939 and included therein airplanes of its fleet of the total true and full value of $77,000.00. That thereafter an additional assessment of omitted property consisting of the remainder of airplanes then owned by the defendant as of May 1, 1939, was added to the tax rolls at a true and full value of $630,000; it was agreed, however, that the actual true and full value of said omitted property on said last-mentioned date was the sum of $511,500.00. That said additional assessment was duly entered by the County Auditor on the assess-

ment and tax books for the year 1939 but was not paid; that thereafter the list of all personal property taxes remaining delinquent on the first day of April, 1940, which included said additional assessment, was duly certified to and filed with the Clerk of the above-named district court; that thereafter, said additional assessment still remaining delinquent, all proceedings required by law were duly taken, including the issuance of a citation to the above-named defendant; and that in response thereto said defendant filed its answer. That the assessed value of said omitted property, figured on the basis of 33⅓% of the true and full value, was $170,500.00; that the tax rate for the year 1939 was 99.2 mills on the dollar; that the correct amount of taxes [fol. 27] levied and assessed against this defendant, based upon said valuations and said rate, is $16,913.60.

X

Pursuant to Section 2018 Mason's Minnesota Statutes, 1927, on the 18th day of March, 1940, the Commissioner of Taxation of the State of Minnesota duly made an order determining that the proper place of listing and assessment for taxation as of May 1, 1939, of certain of the defendant's airplanes which had been actually present in Hennepin County on May 1, 1939, was in Ramsey County.

XI

The defendant paid personal property taxes upon its airplane fleet in some proportion of its full value in the States of Illinois, Wisconsin, North Dakota, Montana, Oregon and Washington for the year 1939.

XII

The total length of the routes over which defendant was running scheduled flights on May 1, 1939, was 2,466 miles. The total length of the defendant's routes over which scheduled flights were maintained in the State of Minnesota on [fol. 28] May 1, 1939, was 320.2 miles. The scheduled route mileage in Minnesota on May 1, 1939, was 14% of the total scheduled route mileage. The scheduled plane mileage of defendant over all its routes on May 1, 1939, was 14,414 miles and the scheduled plane miles in Minnesota on May 1, 1939, were 2,348.4 miles. The proportion of the

scheduled plane miles in Minnesota on May 1, 1939, to scheduled plane miles everywhere was 16%.

From the foregoing Findings of Facts, the Court makes the following

Conclusions of Law

I

That the domicil of the defendant herein on May 1, 1939, was in said Ramsey County.

II

That the proper place for the listing and assessment of its property which was taxable in the State of Minnesota, was in said Ramsey County.

III

That the property of the defendant which is in question in this case and which was added to the assessment and tax [fol. 29] rolls as omitted property by the County Auditor of said Ramsey County had a situs for taxation in the State of Minnesota and not elsewhere.

IV

That said property was duly and regularly in all respects assessed by the proper authorities of said Ramsey County.

V

That the true and full value of said property on May 1, 1939, was the sum of $511,500.00; that the assessed value thereof was the sum of $170,500.00; that the rate of taxation for the year 1939 on such property was 99.2 mills upon the assessed value thereof.

VI

That the plaintiff herein is entitled to judgment against the defendant herein for such taxes in the sum of $16,913.60 together with the penalty thereon which is 8% of the said tax or the sum of $1,353.08; being a total amount of tax and penalty of $18,266.68.

[fol. 30] Let Judgment Be Entered Accordingly.
Dated St. Paul, Minnesota, October 4, 1941.
Kenneth G. Brill, Judge of the District Court.

The entry of Judgment is hereby stayed for 40 days.
Kenneth G. Brill, Judge of the District Court.

In District Court of Ramsey County

Judgment—January 2, 1942

The above entitled matter having been regularly tried before the above named court, the Court having made and filed its findings of fact, conclusions of law and order for judgment; and the parties having stipulated that judgment may be entered without costs to either party.

Now Therefore,

It Is Adjudged that the true and full value of the defendant's property, to-wit: its fleet of airplanes described in the findings of fact filed herein, as of May 1, 1939, was the sum of $511,500.00; that the assessed value thereof was the sum of $170,500.00; that the rate of taxation for the year 1939 on such property was 99.2 mills upon the assessed [fol. 31] value thereof and that the amount of taxes due to the plaintiff from the defendant for the year 1939 is the sum of $16,913.60, together with the penalty thereon at the rate of 8% or the sum of $1,353.08 and that the total amount of the judgment hereby found in favor of the plaintiff and against the defendant is the sum of $18,266.68.

Dated at St. Paul, Minnesota, this 2nd day of January, 1942.

By the Court.

J. J. Fitzgerald, Clerk of the District Court, by A. B. White, Deputy.

Approved as to Form: 1-5-42. Kenneth G. Brill, Judge of the District Court.

[fol. 32] Stipulation waiving bond omitted in printing.

[fol. 33] IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL—January 5, 1942

To the above-named plaintiff and to James F. Lynch and Andrew R. Bratter, its attorneys, and to J. J. Fitzgerald, Clerk of the above-named Court:

You Will Please Take Notice, that the above-named defendant appeals to the Supreme Court of the State of Minnesota from that certain judgment of the above-named Court filed herein on January 5, 1942.

Dated January 5, 1942.

Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for Defendant, E-1006 First Natl. Bk. Bldg., Saint Paul, Minnesota.

[fol. 34] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

Pirsig, J.

Concur: Streissguth, J.

Dissent: Loring, J., Gallagher, C. J., J. J. Olson, J.

33176

STATE OF MINNESOTA, Respondent,

vs.

NORTHWEST AIRLINES, INC., Appellant

SYLLABUS—Filed December 18, 1942

1. A tax by a state without jurisdiction to impose it is unconstitutional as a violation of due process.

2. The decisions of the Supreme Court of the United States will be followed in the interpretation of the meaning of due process under the federal constitution. Although our state constitution contains a similar provision, it was not intended to be more restrictive than that of the federal constitution.

Defendant filed its tax return for the year 1939 in which it included a portion of its airplanes at the full value of [fol. 37] $77,000. This valuation was based on planes in the state on May 1, 1939. Later, an additional assessment was made by the county auditor in which he included the remaining airplanes owned by the defendant at the full value of $511,500.

From the foregoing facts the lower court concluded that all of the planes "had a situs for taxation in the state of Minnesota and not elsewhere" and accordingly directed judgment to be entered for the taxes upon all of the planes in the sum of $16,913.60, together with penalty thereon, making a total of $18,266.68.

The question before us is whether this state may impose a tax upon all of defendant's planes. The right to do so is attacked on the grounds that it is a violation of the due process clauses of the state and federal constitutions and that it is an interference with interstate commerce.

Taking up first the claim that the tax is a violation of due process, the general rule is that a tax by a state which has no jurisdiction to impose it violates the constitutional prohibition against taking property without due process of law. For present purposes it is unnecessary to consider separately the due process clauses of the state and federal constitutions. If under this clause of the federal constitution this state may impose a tax upon all of the planes owned by defendant, it may also do so under the state constitution. The state provision was not intended to be more restrictive than that of the federal constitution. State v. Weyerhauser, 72 Minn. 519, 75 N. W. 718; W. J. Armstrong Co. v. N. Y. C. & H. R. R. Co., 129 Minn. 104, 151 N. W. 917. In In re Estate of Taylor, 175 Minn. 310, 315, 219 N. W. 153, 221 N. W. 64, 65, this court said:

"It is our aim to follow the decisions of the Supreme Court of the United States, since we are construing a provision of the federal constitution, although our own state constitution contains a similar provision."

If, therefore, the tax may be imposed under the due process clause of the Fourteenth Amendment, it may also be imposed under our constitution.

[fol. 38] The airplane has raised many unique legal questions in other fields. We do not, however, consider it of such a nature that it must be placed in a new and inde-

pendent category so far as taxation is concerned. It is but personal property used for the transportation of persons and goods. Its distinction lies in that it leaves the ground and travels through the air. But this is not of significance here. The sovereign power and jurisdiction of a state is not limited to the ground. An airplane in the air over the territory of a state is within the state and subject to its sovereign power. As the Supreme Judicial Court of Massachusetts has said in Smith v. New England Aircraft Co. Inc., 270 Mass. 511, 521, 170 N. E. 385, 389, 69 A. L. R. 300, 308:

"It is essential to the safety of sovereign States that they possess jurisdiction to control the airspace above their territories. It seems to us to rest on the obvious practical necessity of self-protection." See also People v. Katz, 249 N. Y. S. 719, 140 Misc. 46.

The question we have, then, is the broader one of when and under what conditions the state of the owner's domicile loses jurisdiction to tax tangible personal property moving about from state to state? May the state of domicile tax the whole thereof?

Two classes of cases have particular bearing on this question. The first deals with ships upon the high seas. It has been held in those cases that where a ship sails from its home port and into the port of a foreign state and stays there but temporarily for the purpose of loading or unloading it cannot be taxed by the latter state. Hays v. Pacific Mail S. S. Co., 58 U. S. (How.) 596; Morgan v. Parham, 83 U. S. (Wall.) 471; Southern Pacific Co. v. Kentucky, 222 U. S. 63. The rule has been applied to ships plying navigable streams. St. Louis v. The Ferry Company, 78 U. S. (Wall.) 423; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

In some of these cases the court relied upon the maxim *Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam.* Another reason given was that the [fol. 39] property had not "become incorporated with other personal property of the state" seeking to impose the tax. Hays v. Pacific Mail S. S. Co., 58 U. S. (How.) 596; Morgan v. Parham, 83 U. S. (Wall.) 471; and see Old Dominion S. S. Co. v. Virginia, 198 U. S. 299. The more basic reason was given in Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68: "The ancient maxim which assigns to tangibles, as

well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence."

If the ship has obtained an actual situs in a state other than that of the home port, that state might validly subject the ship to the ordinary property taxes of that state. Old Dominion S. S. Co. v. Virginia, 198 U. S. 299. In that event, it has been said that the situs of the domicile yields to the actual situs and resulting dominion of another government.

The second class of cases relating to the question here involved deals with the taxation of rolling stock of railroad companies. For the purpose of determining whether such property has acquired a situs in a state foreign to that of the domicile of the company, Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, introduced a new principle. In that case Pennsylvania imposed what was in substance a property tax upon the cars of an Illinois corporation within the borders of Pennsylvania. A certain proportion of the company's cars was constantly and continuously present there. For that reason, the right of Pennsylvania to impose the tax was sustained, notwithstanding the fact that individual cars making up the average in the state were constantly changing and were there but temporarily. The court looked not at the individual cars but at the average, and that average was permanently located in Pennsylvania. See also Marye v. B. & O. R. Co. 127 U. S. 117. The Pullman Car case, 141 U. S. 18, was followed in, among other decisions, American R. T. Co. v. Hall, 174 U. S. 70, and Union R. T. Co. v. Lynch, 177 U. S. 149. The principle [fol. 40] of the case has its limitations. The foreign state may not tax more than the average number of cars present, even though all the cars of the company might at some time during the tax period be actually, but temporarily, present within the state. A tax on all the cars is invalid. Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158. It is necessary also that an average number of cars appear to be permanently present. This court has held that where the railroad cars of a foreign corporation are but temporarily here the right to tax does not exist. State v. Union Tank Line Co. 94 Minn. 320, 102 N. W. 721.

Defendant contends that the principle of the Pullman Car decision, 141 U. S. 18, is applicable in this case, and that other states through which its planes are routed are

entitled to tax the average number of planes constantly present in those states even though any individual plane may be there but temporarily. The state, on the contrary, takes the position that no situs has been acquired in other states, and, by analogy to the ship cases, this state, being the domicile of defendant, may tax them all. Neither the stipulation nor the findings are as clear as one could wish on whether such an average number of planes was so constantly and permanently in any one state as to acquire a situs there. But we shall not pursue the question, for under the view we adopt it is not a material factor. We concede that the principle of the Pullman Car case is as applicable to planes as it is to railroad cars and that the findings lead to the conclusion that some proportion of defendant's planes acquired a situs in other states and to that extent may be taxed there.

That leaves the further question whether the acquisition of a situs in a foreign state removes the jurisdiction of the state of the owner's domicile to tax. The cases so far discussed do not, except by incidental comment, bear upon that problem. They deal only with the right of the foreign state to tax. So far as a specific item of tangible personal property is concerned, the question was decided in Union [fol. 41] Refrigerator Transit Co. v. Kentucky, 199 U. S. 194. It was there held that if such property has acquired a tax situs in another state it cannot be taxed in the state of its owner's domicile. The principle so laid down has since been uniformly followed. Frick v. Pennsylvania, 268 U. S. 473, 489, 45 S. Ct. 603, 69 L. ed. 1058, 42 A. L. R. 316; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 92, 93, 50 S. Ct. 59, 74 L. ed. 180, 67 A. L. R. 386; Sancho v. Humacao Shipping Corp. (1 Cir.) 108 F. (2d) 157.

It is the claim of defendant that the Transit Company case, 199 U. S. 194, established with equal force that the result is the same when the situs is acquired in the foreign state by the application of the doctrine of the Pullman Car case, 141 U. S. 18. Hence, since some proportion of defendant's planes may, as conceded, be taxed in other states, it is claimed that this state has lost its power to tax to a corresponding degree.

A careful examination of the Transit Company case will disclose that it does not go to the length so claimed for it. It appears that there Kentucky sought to impose what was treated as a property tax upon all the railroad cars owned

by the transit company, which was incorporated in Kentucky. The headquarters for its cars were located at Milwaukee, Wisconsin, at which point they were rented to shippers who used them for the carrying of freight in the United States, Canada, and Mexico. The court held that Kentucky had no jurisdiction to tax all the cars of the company. The record in the case reveals further that some of the cars were in fact constantly coming into and going out of Kentucky, and that the state trial court had found that a definite average number of cars was in the state during the year for which the taxes were imposed. But it is also evident that there were larger numbers of the company's cars which were never within the state at any time during the tax period. The opinion of the court makes it clear that it was this last fact which the court deemed [fol. 42] controlling. The court states the question before it to be (199 U. S. 201) "whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, *permanently* located in other States, and employed there in the prosecution of its business." It states further (P. 204) that "property which is *wholly* and *exclusively* within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation," and that such property "does not and cannot receive protection under its laws. * * * [P. 206] it is taxable in the State where it is *permanently* located and employed and where it receives its *entire* protection." (All italics supplied).

In defining the basis upon which the court denied the right to tax, it said (199 U. S. 202):

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an

extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law."

It is plain that the court in denying the right of Kentucky to tax was speaking about those cars which were permanently in other states and did not reach Kentucky at all. The facts did not raise the question, and there is nothing to indicate that the court intended to hold, that cars going from Kentucky and from time to time returning to it could not be taxed by that state because they had contributed to an average which had acquired a situs in another state. The only question before the court was the validity of the tax on all of the company's cars, some of which were perma- [fol. 43] netnly in other states. It is noteworthy that the court cites and states the holding of the Pullman Car case without suggesting that it had any direct application to the facts before it. We conclude, therefore, that the case does not sustain the claim of defendant that this state has lost the right to tax all its planes because an average of them had obtained a situs in other states.

The only other cases requiring consideration upon this point are New York ex rel. N. Y. C. & H. R. R. Co. v. Miller, 202 U. S. 584, and Johnson Oil Ref. Co. v. Oklahoma, 290 U. S. 158. In the New York Central case, the state of domicile of a railroad company was permitted to tax all the cars of the company despite the fact that an average number of cars was constantly outside the state. The court distinguished the Pullman Car case, 141 U. S. 18, on the ground that it appeared in that case that (202 U. S. 597) "The same cars were continuously receiving and protection of the State and, therefore, it was just that the State should tax a proportion of them." The court expressly reserved the question whether there was "any necessary parallelism between liability elsewhere and immunity at home." That reservation in itself indicates that the court did not consider the question settled by its previous decision in the Transit Company case, 199 U. S. 194.

In the Johnson Oil Ref. case, 290 U. S. 158, the owner of the cars was an Illinois corporation with its principal place of business at Chicago. Oklahoma sought to tax all the cars of the corporation on the ground that they were from time to time during the year within the state. The court held that the power of Oklahoma to tax the cars was limited

to the average number of cars in the state and that a tax on all was invalid. Broad language was used by court in its opinion, and, as ably shown by the dissenting opinion of Mr. Justice Loring, it is reasonably susceptible of more than one interpretation. We believe that it should be read [fol. 44] in the light of the facts before the court. It was dealing with a situation where the only basis of taxation appearing was the average number of cars present in the state. The decision and the opinion are not inconsistent with permitting a state to tax additional or all the cars if additional and constitutionally recognized grounds for the tax exist. If we find, therefore, that an adequate basis existed in this state for taxing all the planes, the Johnson case does not deny the right to tax merely because other states also have the power to do so.

We are left, therefore, without any controlling authority to guide us, and in its absence we must resort to the basic constitutional principles upon which the right or jurisdiction of a state to tax depends. In so doing, we cannot rest upon any logical application of some legalistic concept or *situs*. When we say that property has a *situs* within a state for the purposes of taxation we mean only that it is proper and consistent with due process that that state may impose the tax. There is no constitutional justification for giving the concept a controlling power of its own.

For a time, under the decisions of the United States Supreme Court, this was not true. An attempt was made to use the concept of *situs* with respect to both tangible and intangible property for the purpose of limiting the power to tax to a single state. See Farmers L. & T. Co. v. Minnesota, 280 U. S. 204; First Nat. Bank v. Maine, 284 U. S. 312. In the latter case, Mr. Chief Justice Hughes was a member of the majority of the court which adopted this view. See also his concurrence in the dissenting opinions in Wisconsin v. J. C. Penney Co., 311 U. S. 435, and Curry v. McCanless, 307 U. S. 357. Much of his opinion in Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, can be explained on this basis. On this ground, Blackstone v. Miller, 188 U. S. 189, was overruled. Farmers L. & T. Co. v. Minnesota, 280 U. S. 204, 209. By this means the court sought to bring about what it thought to be a [fol. 45] desirable policy—the avoidance of double taxation. See cases cited *supra*; also Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194. But in more recent decisions

this attempt to read into the due process clause any such limitation has been definitely rejected as an improper judicial attempt to compel the application of views as to wise legislative policy through the process of constitutional interpretation. The possibility of taxation of the same property by more than one state is no longer a constitutional objection. Recently, First Nat. Bank v. Maine, 284 U. S. 312, where the contrary view had been adopted was overruled, and the case of Blackstone v. Miller, 188 U. S. 189, restored to good favor. State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008.

We look, therefore, not to whether another state is entitled to tax, but rather to whether the power to do so exists in this state. Property may have a *situs*, if we wish to use that term, in more than one state, depending upon whether the basic considerations are present which give a state the right to tax under the requirements of due process. These considerations have repeatedly been stated to be first, the sovereign power of the state over the person or property, and, second, the rendering in return of a substantial benefit or protection to the person or property taxed. Thus, in the recent leading case of Curry v. McCanless, 307 U. S. 357, 364, the court said:

"The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so with- [fol. 46] out constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax."

Again, in Wisconsin v. J. C. Penney Co., 311 U. S. 435, the court said:

"A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society * * * [The] test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

See also quotation, *supra*, from Transit Company case, 199 U. S. 202, See Southern Pacific Co. v. Kentucky, 222 U. S. 63.

We need not consider whether all the cases can be logically reconciled with the principles thus laid down. It is sufficient that, particularly in the recent cases, they have been insisted upon and made the criteria for the constitutional basis of the power to tax. It is our duty to follow them.

Applying these principles in this case, we have no difficulty in sustaining the tax of this state upon all the planes owned by defendant. The power of this state over defendant and the property taxed was present. Defendant was incorporated here. Its principal place of business is located in this state, and all the planes at some time or another come within its borders. The benefits conferred upon defendant by the government and laws of this state in relation to all of defendant's planes is equally clear. The policies and decisions made by defendant in connection with the operations of its planes were made here and under the protection and benefit of the laws of this state. The manner and extent of their operations were determined and directed from this state. Particularly significant is the fact that when planes were in need of major repairs and overhauling [fol. 47] the necessary repairing and overhauling were done here. These benefits did not cease the moment the planes crossed the border into another state. They continued and contributed to the successful operation of the planes throughout the course and scope of their operations.

There is, therefore, no violation of due process in the taxation by this state of all the planes. There was a fair basis in the power of this state over defendant and its planes and in the benefits conferred with respect to this property upon which the tax may rest. We hold, therefore, that the tax here in question on all the planes was a valid one.

Our decision does not rest upon any application of the discredited maxim *"Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam,"* nor upon the bare fact that defendant was incorporated here. A more substantial reason for the tax exists. The state is giving a real and substantial return for the tax it seeks to impose. Neither do we question the principle that a specific item of personal property, permanently located in another state, cannot be taxed here. That is not the case before us. We hold only that there is a fair basis upon which this state may impose the tax in question and that any right of another state to impose a similar tax upon some portion of the planes does not adversely affect that basis. It may well be that defendant will be required to pay taxes in other states upon some portion of its planes. If so, it is because, under the principles stated, a fair basis for the tax exists in those states also. In any event, on the facts as they appear before us and under the principles already stated, states other than this one would not appear entitled to tax to any greater extent than the average number of planes within its borders during the tax period. As stated in the concurring opinion of Mr. Justice Frankfurter in State Tax Comm. v. Aldrich, 316 U. S. 174, 183, 62 S. Ct. 1008, 1013:

"Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one State, as well as of the Nation. It does so [fol. 48] because the transaction in its entirety may receive the benefits of more than one government."

Whether or not it is economically wise or fair to impose the tax herein sustained we are not entitled to consider under the principles already stated. That question is more properly addressed to the legislature, whose prerogative and responsibility it is to enter into such considerations. The power to make a good law of necessity carries with it the power to make an unwise one. "A tax within the lawful power of a state" may not "be judicially stricken down

under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses." Magnano Co. v. Hamilton, 292 U. S. 40, 45 (citing cases).

Defendant's second objection to the tax is equally without foundation. That the planes were engaged largely in interstate commerce does not deprive this state of the right to impose the tax. Property engaged in the transportation of interstate commerce may be subjected by a state to the usual nondiscriminatory property taxes if jurisdiction to tax otherwise exists. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18. See also Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, and cases therein cited.

The provisions of the statutes relating to taxation of personal property are sufficiently broad to include all the planes of defendant. All nonexempt personal property owned by a resident is taxed. See Minn. St. 1941, § 272.01 (Mason St. 1927, § 1974), and *Id.* § 272.03, subd. 3 (§ 1979). The statutes do not in express terms exclude such property when located outside the state, and the language of § 272.01 (§ 1974) makes plain enough that the intention was to include it.

The judgment of the lower court is affirmed.

Maynard E. Pirsig.

[fol. 49] Loring, Justice (dissenting):

I find my views at variance with the conclusion arrived at by the majority. I agree with them that, insofar as tangible personal property is concerned, the doctrine of *mobilia sequuntur* is outworn and discarded. See Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194. It follows, of course, as they say, that the place of incorporation of the taxpayer does not control as to such property. This leaves their opinion resting upon the facts that all the planes of defendant at regular times come within the protection of this state, that major repairs are made here, and that the company's offices are here. Does an opinion so grounded harmonize with the principles of due process as developed and announced by the United States Supreme Court?

I think the majority are misled by failing to distinguish between what that court has said in cases involving in-

tangibles and what it has held in those involving tangible property. If the broad expressions used with reference to intangible property such as those used in State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008, cited by the majority, should be applied to tangible property, which was not there under consideration, we should find that the doctrine of *mobilia sequuntur,* which the majority agree is now discarded as to tangible property, would be restored in great measure and made applicable to tangible property as well as to intangibles. It certainly applies only to tangible property when that property has acquired no *situs* whatever for taxation elsewhere. "The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property." Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 206.

The Supreme Court has drawn a clear distinction between tangible personal property and intangible property [fol. 50] in the application of due process. In Curry v. McCanless, 307 U. S. 357, 365, involving intangibles, Mr. Justice Stone (now Chief Justice), speaking for the court, after discussing the *situs* of tangibles in relation to the taxing power, said:

"Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. [Citing cases.] Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities."

Therefore, the broad expressions with reference to the power and jurisdiction to tax contained in cases relative to intangibles, such as State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008, 86 L. ed. 911 (Advance Sheets), and Curry v. McCanless, 307 U. S. 357, are not applicable to due

process as applied to the taxation of tangible property. In the "intangible" cases, the protection of the rights of transfer of the evidence of ownership may result, as in State Tax Comm. v. Aldrich, *supra*, in what appears to be double or multiple taxation.

It appears to me that it would be very unfortunate to extend to tangible property throries which have been applied to intangibles only. The Supreme Court has not done so. Should the habitual use and flight of airplanes over the various jurisdictions be held to subject all the taxpayer's planes—not only a proper proportionate share of them —to double or multiple taxation on their full value, it would not only be unjust but would create a situation so burdensome to the airlines as materially to handicap their development and extension, so vital to the national interest. It would likewise be unfortunate for those states imposing [fol. 51] the tax on the full value and would doubtless in the end result in congressional authorization of the incorporation of airlines under national law and control of taxation. See Mr. Justice Jackson's dissent, concurred in by Mr. Justice Roberts, in State Tax Comm. v. Aldrich, 316 U. S. 174, 185, 202, *supra*.

The problem of taxation of airplanes engaged in scheduled aerial transportation is one of first impression. Airplanes span the continent in a few hours, passing over many jurisdictions in the course of a day's flight. A plane may be in any one state but one or two hours out of the 24, or even only part of an hour. In its very nature, aerial transport is largely interstate. If the operations of an airline were confined to the protection of any single state and to the benefits and opportunities conferred by the laws of that state, such a line would be of little importance in the vast field of air transport. If defendant's operations were confined to the state of Minnesota, doubtless two or three planes would answer its needs. Its ownership of the large number of planes here sought to be taxed is necessitated by its operations in interstate commerce, where it habitually and regularly subjects itself to the protection of other jurisdictions and receives the benefits afforded by the laws of other states, to whose sovereignty it become subject, except as it falls within the control of the federal government. In that regard there is no distinction between the benefit and protection afforded by Minnesota and that afforded by

Illinois, Wisconsin, North Dakota, Montana, Idaho, or Washington. If the protection and benefit extended by state sovereignty to these aircraft justifies a tax on the full value of all of them because they are continually traversing the air across this state and because at times they all come within its boundaries, then every state traversed by the air route may tax the whole number that flies over such state on the full value. If the tax imposed by Minnesota on the full value of all the planes used by defendant is sustained, it becomes not only a tax imposed for the protection afforded [fol. 52] by Minnesota but a tax burdening the entire service of these planes throughout their route. In reality it assesses their owner as if its protection covered the planes throughout their route. Thus, it assesses for protection it does not furnish and which it has no power to furnish.

"The power of taxation, indispensible to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in protection of his person and property." Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202.

I am in full accord with the view that the law as applied to steamships where the sovereignty of the flag follows the ship throughout the voyage does not apply to airplanes flying scheduled flights over land. Logically, planes are more like fleets of railroad cars being operated in interstate traffic.

Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, was a case where Pawnee county, Oklahoma, under a state statute, sought to tax the entire fleet of the Johnson company's tank cars, which were used mainly in transporting oil from its refinery in Oklahoma to other states. The Johnson company was an Illinois corporation, but its refinery, trackage, and repair facilities were in Oklahoma. Like defendant's planes, the cars were in almost continuous movement and the major share of the time were beyond the boundaries of the state, though they were all marked to be returned to the refinery in Oklahoma, where was located the control and supervision of the cars. Thus we have a situation much like that presented to us in the case at bar except that the Johnson company was incorporated in Illinois instead of Oklahoma, a matter which the United States Supreme Court and the majority here seem to

regard as immaterial insofar as tangible property is concerned. A stronger feature for the company in the case at bar is that its planes are beyond the state boundaries on regular uniform schedules and routes defined by the Civil Aeronautics Authority. Oklahoma's right to tax all the [fol. 53] cars was challenged as a violation of the due process clause of the Fourteenth Amendment. Relating to the jurisdiction to tax, the court in that case, speaking through Mr. Chief Justice Hughes, said (290 U. S. 162):

..."*The basis of the jurisdiction is the habitual employment of the property within the State.* By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. *When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States.*" (Italics supplied.)

True, the Chief Justice, speaking for the court, also said (290 U. S. 161):

"Appellant had its domicile in Illinois, and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.'"

True enough, assuming that the property had acquired a *situs* in the domiciliary state, but the statement was obviously not intended to apply if it had not. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, *supra*. But the situation in the Johnson Oil Co. case, 290 U. S. 158, as here, was that the tangible personal property had acquired *situs* for proportionate taxation elsewhere. In the case at bar, the flights on regular daily schedules throughout the year were not mere (290 U. S. 161) "occasional excursions" into other jurisdictions, but the property (290 U. S. 162) "habitually used and employed" on such flights within other states acquired a *situs* for proportionate taxation in those states.

As illustrated by the Johnson Oil Co. case, the *situs* in the other states for tax purposes may be proportionate only. It need not be such a *situs* as would confer jurisdic-

tion to tax the full value of all cars which come into the state even when they come in habitual use. It may be a jurisdiction to tax a fair proportion as determined by aver- [fol. 54] age presence or other fair method of apportioning the tax. It might, in the case of aircraft, be based upon miles or hours flown in the state in proportion to those flown elsewhere.

I cannot find that the Johnson Oil Co. case has been overruled or qualified insofar as tangible property is concerned, nor do I think it is in conflict with the previous case of People ex rel. N. Y. C. & H. R. R. Co. v. Miller, 202 U. S. 584, 597, where New York's franchise tax, measured by property, was sustained as applied to all the cars of the railroad company. There the court said, speaking of the problem before it:

"In the present case, however, it does not appear that *any specific cars* or *any average of cars* was so continuously in any other State as to be taxable there. *The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads.*" (Italics supplied.)

Whatever the actual facts as to car routings may have been, the court in that case viewed the record as showing only "random excursions of casually chosen cars" outside the state. The case was decided on that assumption. That situation is not present in the case at bar. Here we have air transport planes continuously and habitually used on scheduled flights over fixed routes, much more extensive than through Minnesota, over at least six other states, where they have acquired a situs for proportionate taxation by virtue of the protection and benefit of those jurisdictions, which subjects them to taxation in those states. American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 82; Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, *supra;* Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149.

While neither state nor national constitution contains a specific prohibition against double or multiple taxation as such, obviously the imposition of such a tax may under certain circumstances offend some provision of the fundamental law. Reed v. Bjornson, 191 Minn. 254, 253 N. W.

102. It is to be avoided if reasonably possible. Bemis Bro. [fol. 55] Bag Co. v. Wallace, 197 Minn. 216, 228, 266 N. W. 690. "Protection against * * * unjust and oppressive taxation is matter of the greatest moment." Farmers L. & T. Co. v. Minnesota, 280 U. S. 204, 212. Here, quite obviously, it is not only oppressive but burdens interstate commerce. It would not do so if it were confined to Minnesota's proportionate share.

There is no question but that Minnesota may tax its proportionate share of the airplanes here involved; but, as said in Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 162, the jurisdiction "to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other States." It is the power of other states to tax due to habitual use and employment of the planes within their boundaries which affects the *situs* of the planes and the right of Minnesota to tax more than its proportionate share. As said in Farmers L. & T. Co. v. Minnesota, 280 U. S. 204, 211, "the right of one State to tax may depend somewhat upon the *power* of another to do so." Certainly that rule has not been changed as to tangibles as witness the Johnson Oil Co. case, *supra*. It is the existence of the power to tax, not the exercise of it, that affects the *situs*. Sancho v. Humacao Shipping Corp. (1 Cir.) 108 F. (2d) 157, 160, though in the case at bar all states on defendant's scheduled routes except Idaho have exercised it.

Whether a proportionate tax should be imposed on the theory of miles or hours flown within the state as compared to the total mileage or hours flown, or upon the basis of average number of planes present in the state under normal operating conditions, having in mind that during most of the time, as was the case with the cars in the Johnson Oil Co. case, most of the planes are outside the state, is probably not a problem for this court to determine. It should not, however, distinguish this case from the Johnson Oil Co. case. That the planes come into the state every day or nearly every day does not distinguish it. They are out of [fol. 56] the state on flights over other jurisdictions a large proportion of the time. The only difference from the Johnson Oil Co. case is that planes move faster and more frequently than cars. The principle is the same. What this court should say is that the tax may only be imposed by Minnesota upon its proportionate share figured on some

reasonable basis, which, primarily, the taxing authorities should first determine.

To summarize:

1. We have a case of a specific tax on tangible personal property, *viz.*, aircraft.

2. Such property is not subject to the rules applied to intangibles.

3. By habitual use and employment on fixed schedules in flights over other states, the aircraft have acquired a *situs* for proportionnate taxation in those states.

4. That *situs* must be taken into consideration in determining Minnesota's constitutional power to tax, regardless of the domicile or principal place of business of the taxpayer.

5. Minnesota may tax only proportionate part of the value of the property arrived at on some reasonable basis primarily to be fixed by the taxing authorities.

I think the judgment should be reversed.

Loring, J.

GALLAGHER, Chief Justice (dissenting):

I concur in the dissent of Mr. Justice Loring.

Gallagher, C. J.

JULIUS J. OLSON, Justice (dissenting):

I concur in the views of Mr. Justice Loring.

Julius J. Olson, J.

[fol. 57] STREISSGUTH, Justice (concurring specially).

The dissenting opinion of Mr. Justice Loring is based principally upon his interpretation of Johnson Oil Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158. He insists that that case is indistinguishable from the case at bar, notwithstanding that there the state, seeking to tax an entire fleet of floating tank cars, was not the state of the corporate owner's domicile. To quote from his dissent:

"Thus we have a situation much like that presented to us in the case at bar except that the Johnson company was incorporated in Illinois instead of Oklahoma, a matter which the United States Supreme Court and the majority here

seem to regard as immaterial insofar as tangible property is concerned."

But an examination of the opinion of Mr. Chief Justice Hughes establishes the contrary. To quote (290 U. S. 161):

"Appellant had its domicile in Illinois and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.'"

In support of this statement, the Chief Justice cites New York ex rel. N. Y. C. & H. R. R. Co. v. Miller, 202 U. S. 584, 26 S. Ct. 714, 50 L. ed. 1155; Southern Pacific Co. v. Kentucky, 222 U. S. 63, 32 S. Ct. 13, 56 L. ed. 96. These cited cases and not the Johnson Oil Co. case are controlling here, as clearly pointed out by Mr. Justice Pirsig in his opinion. Granted that domicile of the corporate owner standing alone will not vest in the domiciliary state the power to tax an entire fleet of airplanes, yet the additional facts that the corporation's principal place of business is in the state, that all of its airplanes come within its borders during the tax year on scheduled trips and for repairs, and that the manner and extent of their operation is determined and directed from the state, supply the additional elements necessary to invest the state with power to tax such planes.
[fol. 58] I not only fully but emphatically agree with Mr. Justice Loring that "to subject all the taxpayer's planes * * * to double or multiple taxation * * * would not only be unjust but would create a situation so burdensome to the airlines as materially to handicap their development and extension, so vital to the national interest."

As a court we cannot, however, concern ourselves with policy, a purely legislative question. Our only inquiry is power. It is an uncontroverted doctrine that courts will not consider the justice, wisdom, expediency, propriety, necessity, or policy of tax laws or other legislation. That cardinal principle is the basis of the circumspect avoidance by the judiciary of encroachment upon the exclusive domain of the legislature, a coequal branch of the government. 11 Am. Jur., Constitutional Law, pp. 802-3-4, 900, §§ 136-138, 198; 1 Cooley, Const. Limitations (8 ed.) 346; State v. Fairmont Creamery Co., 162 Minn. 146, 202 N. W. 714, 42 A. L. R. 548; Champion v. Ames (lottery case) 188 U. S. 321, 363,

23 S. Ct. 321, 47 L. ed. 492, 504; McCrary v. United States, 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78, 1 Ann. Cas. 561.

As recently as November 9, 1942, in the case of Wickard v. Filburn, — U. S. —, Mr. Justice Jackson reiterated this rule in the following language:

"The validity of an Act of Congress is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely because it is deemed in a particular case to work on inequitable result."

Mr. Justice Pirsig has convincingly demonstrated that this state's power to tax defendant's entire fleet of airplanes exists so long as no part of it is permanently located in another state. I therefore concur in his conclusion, though reluctantly and not without suggesting that, for reasons so forcibly pointed out by Mr. Justice Loring, remedial legis-
[fol. 59] lation to correct any possible unfairness to defendant and other companies similarly situated be enacted without delay lest congress assert its undisputed power and authorize "the incorporation of airlines under national law and control of taxation."

Streissguth, J.

[fol. 60] IN SUPREME COURT OF MINNESOTA

In the Matter of the Proceedings to Enforce Payment of Delinquent Personal Property Taxes for the Year 1939

33176

STATE OF MINNESOTA, Respondent,

vs.

NORTHWEST AIRLINES, INC., a Corporation, Appellant

JUDGMENT—December 31, 1942

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things affirmed.

[fol. 61] IN SUPREME COURT OF MINNESOTA

[Title omitted]

STIPULATION AS TO RECORD—March 17, 1943

Upon the proposed petition of the appellant to the Supreme Court of the United States for writ of certiorari to the Supreme Court of Minnesota, it is stipulated that the record to be certified to the Supreme Court of the United States by the Clerk of the Supreme Court of Minnesota shall consist of:

1. The record filed by appellant of the proceedings in the District Court of Ramsey County, Minnesota, excepting and deleting therefrom the "Amended Stipulation of Facts" found on pages nine to seventeen, inclusive, of said record.

2. Amended Stipulation of Facts appended to respondent's supplemental brief and found on pages three to twelve, inclusive, thereof.

3. The opinions (majority and minority) of the Supreme Court of Minnesota.

4. The judgment of the Supreme Court of Minnesota.

5. This stipulation.

Dated March 17, 1943.

M. J. Doherty, W. E. Rumble, Attorneys for Appellant. James F. Lynch, Andrew R. Bratter, Attorneys for Respondent.

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

NORTHWEST AIRLINES, INC., Petitioner,

vs.

THE STATE OF MINNESOTA

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 5th, 1943.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Dated this 31st day of March, 1943.

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 10, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
APR 3 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1942

No. 8[redacted] 33

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND SUPPORTING BRIEF.

M. J. DOHERTY,
W. E. RUMBLE,
Saint Paul, Minnesota,
Attorneys for Petitioner.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Saint Paul, Minnesota,
Of Counsel.

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Supreme Court of the United States

October Term, 1942

No. .....

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Northwest Airlines, Inc., hereby petitions for review, upon writ of certiorari, of the decision and judgment of the Supreme Court of Minnesota, being the court of last resort of that State, and respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED.

This is an action by the State of Minnesota to recover from Northwest Airlines, Inc. the amount of an alleged delinquent personal property tax (and penalty) assessed against the Airlines for the year 1939. The tax was upon the entire fleet of airplanes owned by the Airlines and operated by it in interstate transportation of persons and property. The action was contested by the Airlines on the ground that the levy and assessment of the tax was in violation of the commerce, due process, and equal protection clauses of the Federal Constitution, and also of certain provisions of the Constitution of Minnesota. The court of first instance (District Court of Ramsey County, Minnesota) overruled the objections, held the assessment valid, and rendered judgment in favor of the State and against the Airlines for the sum of $18,266.68. Upon appeal to the Supreme Court of Minnesota, this judgment was affirmed (three justices dissenting) and a petition for rehearing was denied.

The case was tried upon a stipulation of facts. From this stipulation, and the findings based thereon, it appears that the Airlines is a Minnesota corporation engaged in the transportation of persons and property, including mail, in interstate commerce, involving the operation of its aircraft on regular schedules through and serving seven states and a province of Canada. No particular airplanes are allotted to any route or section. All are operated interchangeably over the whole system. The result is that while no specific planes can be allocated to any state, a proportion of the entire fleet is capable of being so allocated on a plane mileage, route mileage, or similar basis. (Amended Stipulation of Facts, paragraphs I to VIII.)

The position of the Airlines was and is that Minnesota is without jurisdiction to tax the entire fleet of airplanes on a full *ad valorem* basis; that it can, within its constitutional power, tax only that proportion of the fleet which is regularly and habitually used in the state; that a corresponding right is enjoyed and is in fact exercised by each of the other states through which the planes operate, and that authority in such other states to tax proportions of the fleet is incompatible with authority in Minnesota to tax the whole.

QUESTIONS PRESENTED.

The ultimate questions thus presented are whether the enforcement of the tax as levied would deprive the Airlines of its property without due process of law or deny it the equal protection of the laws, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, or would place an unlawful burden on interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States.

BASIS OF JURISDICTION.

A review of the judgment is plainly within the jurisdiction of this Court, under Section 237(b) of the Judicial Code (28 U. S. C. A., Section 344), authorizing such review:

> "Where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States."

The citation by which the action was instituted by the State did not designate the statute under which the right to

impose the tax was asserted. The answer of the Airlines (interposed in the District Court), alleges that the levy and assessment of the tax is in violation of the defendant's rights under the due process, equal protection, and commerce clauses of the Federal Constitution, without conjecture as to the statute under which the State had assumed to impose the tax (Section X of defendant's answer). This position was adhered to on appeal to the State Supreme Court, where the same constitutional objections to the tax were raised by assignments of error and argument. In the circumstances, the procedure available to the Airlines appears to be by application for certiorari rather than by appeal. *Memphis Natural Gas Co. v. Beeler,* 315 U. S. 649, 86 L. Ed. 745.

The judgment sought to be reviewed was entered in the Supreme Court of Minnesota on December 31, 1942.

A copy of the findings of fact and conclusions of law of the District Court is found in the record, immediately following the Amended Stipulation of Facts.

A copy of the opinions (majority and minority) of the Supreme Court of Minnesota are included in the printed record near the conclusion thereof. The decision is reported in 7 N. W. (2d) 691, but has not yet appeared in the Minnesota Reports.

REASON FOR ALLOWANCE OF WRIT.

The Supreme Court of Minnesota has decided a Federal question of substance in a way that is not in accord with the applicable decisions of this Court.

The questions presented are of grave importance not only to this Airline but to the entire air transport in-

dustry in the United States. Upon the answers to these questions depends the liability of this and other Airlines to inordinately burdensome multiple taxation of their aircraft employed in interstate transportation. The importance of the matter to the Airlines is too apparent to require emphasis. The matter is in fact one of threefold concern: *first*, to the Airlines, that intolerable burden of multiple taxation be avoided; *second*, to the States, that there be an equitable sharing of the revenues to be derived from legitimate taxation of airplanes employed in interstate flights, and, *third*, to the general public, that there be an opportunity for normal development, unhampered by oppressive taxation, of a young and rapidly growing industry vital to the national welfare.

More broadly there is involved the general question of whether tangible personal property may be subjected to multiple taxation; whether such property may have a tax situs in more than one state, or whether as to such property tax liability in one state is correlative with immunity in others.

With respect to the taxation of airplanes, the questions presented are of first impression, but the applicable principle has been established by this Court in cases involving taxation of the rolling stock of interstate railroads. The decisions of this Court in such cases are in direct conflict with the decision of the Supreme Court of Minnesota in the instant case, and a consistent application of the rule established by them necessarily condemns the present tax. The rolling stock cases will be analyzed in the brief supporting this petition.

STATEMENT OF THE CASE.

Some factual details, in addition to the foregoing summary statement, seem desirable, particularly in reference to the nature of the Airlines' business and the manner of its operation. It operates a fleet of air transport planes between Chicago and Seattle and Portland and a connecting line between Fargo, North Dakota, and Winnipeg, Canada. On its Chicago-Pacific Coast route it serves seven states, in the course of which it makes regular scheduled landings in seventeen cities, two of which are in Minnesota. The total route mileage in May, 1939, was 2,466 miles, of which 320.2 miles, or fourteen per cent, were in Minnesota. The daily plane mileage was 14,414 miles, of which 2,348.4 miles, or sixteen per cent, were in Minnesota. At seven of its landing points it operates hangars and business offices, two of which (at Chicago and Fargo) are owned. Five are leased. At the other ten landing points it leases office and other space for its business headquarters and activities. At each point it has a station manager, radio operator, and other employees. On its Chicago-Pacific Coast route there are four flight crew bases, representing the termini of flight crew divisions, where the crews begin and end their runs and make their headquarters. Fargo to Winnipeg is one division. Also there are six so-called maintenance bases, one of which is at Minneapolis. At these bases are maintained completely manned and equipped service stations for the repair and maintenance of planes. At Saint Paul there is maintained a service station for major overhaul and repair work. (Amended Stipulation of Facts paragraphs II to VI and XII.)

On both routes the Airlines' planes, as a matter of practical operation, are obliged to and do follow approximately fixed courses of travel. This is made necessary by the regular landing points, by the radio range courses operated by the Civil Aeronautics Authority, and by the regular series of emergency landing fields, also maintained by the Authority. The Airlines operates under a certificate of convenience and necessity issued by the Civil Aeronautics Board, which fixes both its terminal points and all intermediate stops. Its course is prescribed, and the law permits neither deviation nor abandonment. (Amended Stipulation of Facts paragraphs V and VIII.)

ASSIGNMENTS OF ERROR.

The Supreme Court of Minnesota erred:

1. In affirming the judgment of the District Court of Ramsey County, Minnesota.

2. In holding the tax valid.

3. In holding that appellant's entire fleet of airplanes had a taxable situs in Minnesota.

4. In holding that any given portion of appellant's airplanes might have a tax situs in more than one state.

5. In holding that the tax was not a violation of Section 8 of Article I of the Constitution of the United States and in refusing to hold the contrary.

6. In holding that the tax was not a violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States and in refusing to hold the contrary.

ARGUMENT.

Enforcement of the Tax in Question Would Deprive the Airlines of Its Property Without Due Process of Law.

The decision of the Supreme Court of Minnesota is wholly out of accord with the applicable decisions of this Court respecting taxation of tangible personal property, and appears to be largely the result of an endeavor to apply to the case what was said by this Court respecting taxation of intangibles, or more accurately to apply the interpretation placed by the majority below upon what was so said.

Rolling Stock Cases.

The true rule applicable under the facts of this case is that laid down by this Court in the so-called rolling stock cases. That rule is that equipment habitually employed in interstate transportation of persons and property between and through several states is taxable by each of the states on an average or proportionate basis only, and is not taxable by any of the states in its entirety. *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *American Refrigerator Transit Company v. Hall*, 174 U. S. 70; *Union Refrigerator Transit Company v. Lynch*, 177 U. S. 149; *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194; *Union Tank Line Company v. Wright*, 249 U. S. 275; *Pullman Company v. Richardson*, 261 U. S. 330; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158. The rule could be stated in broader terms, but the foregoing covers the case.

In *Johnson Oil Refining Co. v. Oklahoma,* supra, the facts were that the Refining Company, an Illinois corporation, operated a refinery in Pawnee County, Oklahoma, from which it shipped oil in its own tank cars into many states. A tax laid by Oklahoma on the entire fleet of cars was held to be in violation of the due process clause of the Fourteenth Amendment. This Court said:

> "When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

In *Union Refrigerator Transit Company v. Kentucky,* supra, an attempt was made by the State of Kentucky to tax in its entirety an aggregate of railroad cars owned by the Transit Company, a Kentucky corporation, portions of which were habitually used in other states by shipper lessees. This tax was also held to be in violation of the Fourteenth Amendment. As illustrating the rule of apportionment which must be applied in such cases, the Court said, referring to its previous decision in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S. 18:

> "We have also held that, if a corporation be engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars

> are run within the State bears to the whole number of miles in all the States over which its cars are run."

In *American Refrigerator Transit Co. v. Hall,* supra, this Court sustained a tax by the State of Colorado based upon the average number of the Refrigerator Company's cars employed in the state during the period in question, with this comment:

> "We think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

The facts of these cases are indistinguishable in principle from those of the instant case, and the rule there established should control. The Supreme Court of Minnesota was agreed (1) that the rolling stock rule is as applicable to airplanes as to railroad cars; (2) that some proportion of the Airlines' planes acquired a situs in other states, and to that extent were taxable in such states; (3) that the power of each such other state to tax was limited to the average number of planes within its borders during the tax period; (4) that if a specific item of tangible personal property acquired a situs in another state, it could not be taxed at the owner's domicile. The Court said: "The question * * * is * * * one of when and under what conditions the state of the owner's domicile loses jurisdiction to tax tangible personal property moving about from state to state."

Basis of Majority Opinion Below and Errors Involved Therein.

From the premises just reviewed the invalidity of the tax would seem to inevitably follow. The Court below reached the contrary conclusion, apparently upon the following main considerations: (1) Notwithstanding its disclaimer of reliance upon the doctrine of *mobilia sequunter personam,* large importance was attributed to the presence in Minnesota of the corporate domicile and main business office of the Airlines; (2) that all of defendant's airplanes were at some time during the year in the State, and that major repairs were made there; (3) that the Airlines shared in the benefit of the government and laws of the State; (4) certain recent decisions of this Court were evidently interpreted as indicating a trend towards the view that tangible personal property may have a tax situs in and be taxed by more than one State.

Place of Domicile and of Main Business Office Not Controlling.

That the Airlines was chartered by Minnesota is not a controlling fact at least as to tangible property having a tax situs elsewhere. The personal property in question (proportion of planes habitually used outside Minnesota) was found below to have acquired a tax situs in other states. This excluded it from taxation by Minnesota. *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Frick v. Pennsylvania,* 268 U. S. 473.

In the *Union Refrigerator Transit Company* case (to which brief reference has already been made), this Court condemned an attempt by Kentucky, the company's domi-

cile, to tax its rolling stock employed in other states. The Court below thought this case distinguishable from the instant case on the ground that in the Transit Company case some of the cars were never physically in Kentucky during the tax period, while in the present case it was found that, although only a part of the Airlines' fleet had been in Minnesota on May 1, 1939, the assessment valuation date, all of its planes had been in the State at times during the year. The decision in the Transit Company case does not rest upon any such narrow distinction, and it becomes at least doubtful that the Court below correctly construed the language of the opinion when read in the light of the facts as they appear from the findings of the County Court of Kentucky, not questioned on appeal. The County Court determined:

> "* * * that the transit company was the owner of two thousand cars in September, 1897, 1898, 1899, and 1900 * * *; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list *such a proportion* of its cars as *under a system of averages* upon their gross earnings were shown to be used in the state of Kentucky during the fiscal year, the court finding *by this method* that there were subject to assessment in Kentucky twenty-eight cars for the year 1897, twenty-nine for the year 1898, forty for the year 1899, and sixty-seven for the year 1900." (Italics supplied.)

This finding obviously does not refer to any particular twenty-eight, twenty-nine, forty, or sixty-seven cars, but only expresses the conclusion that that was the *average number* of cars in the state during the respective years in question. The ratio may render it improbable that each of the two thousand cars was at any time in the state dur-

ing any year, but that is not impossible. If the Court considered the point of any decisive significance, some comment might have been expected upon it. When the Court referred to the property involved as being "permanently located in other states and employed there", it may well have referred to the *proportion* of the company's cars so located and used rather than to specific cars. It is hardly conceivable that the decision of this Court would have been different had it affirmatively appeared that all of the Transit Company's cars had at some time during the year been in Kentucky

That the location in Minnesota of the Airlines' main business office and hangar for major repair work is not of controlling significance is determined by the decision in *Johnson Oil Refining Co. v. Oklahoma,* before discussed. The Refining Company used its own fleet of tank cars for the shipment of its products into various states. After making deliveries the cars returned to the refinery, where they were repaired as needed, refilled, and reshipped or held for later use. The refinery was the operational headquarters of the company. Yet a tax by Oklahoma on the entire fleet of cars was held invalid, the Court saying:

> "The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other states."

The corporate domicile and business headquarters of the Airlines could at most draw the property in question to the jurisdiction of Minnesota for taxation only if that property had no tax situs elsewhere. It was determined by the Court below that it did have a tax situs elsewhere.

Tax Not Justified On Theory of "Equivalent" of Protection.

The authority to tax is also predicated upon supposed governmental protection given in return by the State of Minnesota. One of the authorities cited in support of this theory is *Union Transit Company v. Kentucky,* 199 U. S. 194, in which the Court said:

> "The power of taxation * * * is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his property * * *."

The equivalence here spoken of does not require that the benefits of government be appraised in dollars and cents and balanced against the tax. It does, however, require at least a theoretical "equivalent" having some minimum limit. Also the protection and benefits must be with respect to the particular property in question rather than to the taxpayer generally. Defendant's franchise to exist as a corporation under the laws of Minnesota and the privilege of exercising corporate management and business direction in that state is obviously not such a benefit in relation to the corporation's tangible property located elsewhere as to authorize the taxation of that property. *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Frick v. Pennsylvania,* 268 U. S. 473. The benefits must have a more direct relation to the property. The impossibility of an "equivalent" in the present case seems self-evident. The majority opinion below recognizes the right of other states to tax a *proportion* of defendant's planes on the assumption, presumably, that those states give in return an equivalent of protection. Such an assumption precludes justification of a like tax by the State of Minnesota upon the same property on the

theory of another equivalence of protection. If such a claim be sustained, then a dozen or more states traversed by an air route might with equal show of right impose a full tax upon the air transport company's fleet of planes upon the pretext of an equivalent of protection. The havoc which might be wrought upon this industry by such a doctrine can readily be seen.

No Distinction Respecting Situs Between Proportions and Specific Items of Tangible Personal Property.

The Court below appears to draw a distinction between tangible personal property represented by specific items and tangible personal property represented by proportions. This is illogical and contrary to the rolling stock cases. The supposed distinction disregards the conception which permits taxation of different *proportions* of the same property by different states. Situs in such cases is based upon habitual use. Habitual use of a *proportion* is deemed for tax purposes the legal equivalent of permanent location of specific items equal in the aggregate to the given proportion. In either case the tax is upon *tangible* personal property. There is nothing else to tax. This is merely like saying that a tax upon an undivided interest in land is a tax upon real estate. A *proportion* is no more capable of having a permanent location or situs in two different states, and therefore of being taxable in both, than would any individual item of the tangibles represented in the proportion. Hence the situs of a proportion of defendant's planes beyond the State (as found by the Court below) just as effectively removes that proportion from the State's jurisdiction as would a foreign situs of specific planes.

Cases On Taxation of Intangibles.

The majority opinion below finally rests largely upon the supposed significance of the decisions of this Court in *State Tax Commissioner v. Aldrich,* 316 U. S. 174, and *Curry v. McCanless,* 307 U. S. 357. *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, a privilege tax case, is also referred to, but rather for general language used than for what was decided. The *Aldrich* and *McCanless* cases are apparently construed as erasing all distinction between tangible and intangible personal property as respects multiple tax situses and liability to tax in more than one state. *"Property",* the Court said, "may have a situs in more than one state. * * *" The *Aldrich* and *McCanless* cases have no such broad implication. They were concerned with transfer taxes upon intangibles, and jurisdiction to tax was discussed only in terms of intangibles and of the nature and characteristics of that class of property. There was a careful avoidance of indiscriminate reference to personal property generally or the inclusion of tangibles with intangibles. In the *Aldrich* case, as the Court below observed, *First National Bank v. Maine,* 284 U. S. 312, was overruled, and *Blackstone v. Miller,* 188 U. S. 189, was reinstated. But again both of these cases dealt only with succession taxes on intangibles. It is important to note that there has been no overruling of *Frick v. Pennsylvania,* 268 U. S. 473, or of *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341, or of the decisions in the rolling stock cases. These are the cases that established the rule with reference to the taxation of tangibles. In the *Frick* case, this Court held Pennsylvania to be without power to impose a tax on transfer by death of a Pennsylvania resident in respect of tangible personal property located else-

where. The State urged as authority for the tax *Blackstone v. Miller* and a subsequent case. The comment of this Court was:

> "Both cases related to intangible personalty, which has been regarded as on a different footing from tangible personalty. When they are read with this distinction in mind, * * * it is apparent that they do not support the tax in question."

The same distinction is implicit in *Curry v. McCanless,* 307 U. S. 357, involving inheritance and succession taxes upon intangible property in which the opinion spoke of the "cleavage between the rules of law applicable to tangibles and those relating to intangibles", and said:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located * * * for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

And later added:

> "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things."

For another decision drawing the same distinction, see *Blodgett v. Silberman,* 277 U. S. 1. In *Wheeling Steel Corporation v. Fox,* 298 U. S. 193, 209, it was said:

> "When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception."

It is noteworthy that all of the decisions cited in the *Aldrich* case as supporting that decision and as condemning *First National Bank v. Maine* (with one exception not here significant) are decisions involving the taxation of intangible property. There is nothing in these cases marking a departure from the established rule that tangible personal property can have but one situs, and therefore can be but once taxed.

The Statutes.

It may be of interest to the Court to know of the basic taxing statutes of Minnesota.

Section 272.01, Minnesota Statutes, 1941 (Section 1974, Mason's Minnesota Statutes, 1927), reads as follows:

> "All real and personal property in this state and all personal property of persons residing therein, including the property of corporations, * * * is taxable * * *."

This statute was considered by the Court below to be authority for the tax. That there is no other statutory authority for it will probably be conceded by the State. This statute, literally read, taxes all tangible as well as intangible personal property of persons residing in the State, even though physically and permanently located elsewhere. So construed, the statute would manifestly be unconstitutional as authorizing the taxation of property wholly beyond the State's jurisdiction.

Section 273.01, Minnesota Statutes, 1941 (Section 1984, Mason's Minnesota Statutes, 1927), reads in part as follows:

> "Personal property shall be listed and assessed annually with reference to its value on May 1, and if ac-

quired on that day shall be listed by or for the person acquiring it."

On May 1, 1939, only a part of the Airlines' fleet of airplanes was in the State of Minnesota at any time during the day, and of the fifteen planes that were in the state on that day only eight were in the State during the entire day. (Amended Stipulation of Facts Paragraph VII.) This serves to emphasize the overexertion of the power of the State in assuming to impose a tax upon the entire fleet.

CONCLUSION.

The foregoing, it is submitted, compels the conclusion that a portion of the Airlines' fleet of planes has a physical situs without the State of Minnesota, and is therefore beyond the jurisdiction of the State in respect of taxation. As to that portion of its planes, the exaction of the tax in question would deprive the Airlines of its property without due process of law, in violation of the Fourteenth Amendment. This being considered the clearest ground against the validity of the tax, the equal protection and commerce clauses, which are more uncertain of application, will not be urged in this brief.

One more word on the importance of a decision by the ultimate judicial authority on the constitutional question here presented. The air transport business has had very rapid development and is still growing at an extraordinary rate. The tremendous impetus to that growth imparted by the present world war will undoubtedly carry through after the war and give the industry an importance in the national and world economy that will dwarf even its present

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IN THE

Supreme Court of the United States

October Term, 1943

No. 33

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

GROUND OF JURISDICTION.

The jurisdiction of the Court is invoked on the ground that the tax sought to be recovered in the action was levied and assessed in violation of petitioner's rights under the Constitution of the United States, and particularly under Section 1 of the Fourteenth Amendment and Section 8 of

Article I. Jurisdiction in such case is conferred by Section 237(b) of the Judicial Code (28 U. S. C. A., Sec. 344) authorizing a review by this Court:

> "Where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States."

STATEMENT OF THE CASE.

This is an action by the State of Minnesota to recover from Northwest Airlines, Inc. (a Minnesota corporation) the amount of an alleged delinquent personal property tax assessed against the Airlines for the year 1939. The tax was upon the entire fleet of airplanes owned and operated by the Airlines in interstate transportation of persons and property. The route over which the planes are operated is between Chicago and Seattle and Portland, with a connecting line between Fargo, North Dakota, and Winnipeg, Canada. On its Chicago-Pacific Coast route the Airlines serves seven states, in the course of which it makes regular scheduled landings in seventeen cities, two of which are in Minnesota. The total length of route in May, 1939, was 2,466 miles, of which 320.2 miles, or fourteen per cent, were in Minnesota. The daily plane mileage was 14,414, of which 2,348.4, or sixteen per cent, were in Minnesota. At seven of its landing points the Airlines operates hangars and business offices, two of which (at Chicago and Fargo) it owns. Five are leased. At the other ten landing points it leases office and other space for its business headquarters and activities. At each point it has a station manager, radio operator, and other employees. On its Chicago-Pacific Coast route

there are four flight crew bases, representing the termini of flight crew divisions, where the crews begin and end their runs and make their headquarters. Fargo to Winnipeg is one division. Also there are six so-called maintenance bases, one of which is at Minneapolis. Five are in states other than Minnesota. At these bases are maintained completely manned and equipped service stations for the repair and maintenance of planes. At Saint Paul there is maintained a service station for major overhaul and repair work (5-15).* No particular airplanes are allotted to any route or section. All are operated interchangeably over the whole system (7, 12). The result is that while no specific planes can be allocated to any state, a proportion of the entire fleet is capable of being so allocated on a plane mileage, route mileage, or similar basis.

On both routes the Airlines' planes, as a matter of practical operation, are obliged to and do follow approximately fixed courses of travel. This is made necessary by the regular landing points, by the radio range courses operated by the Civil Aeronautics Authority, and by the regular series of emergency landing fields also maintained by the Authority (7, 12). The Airlines operates under a certificate of convenience and necessity issued by the Civil Aeronautics Board, which fixes both its terminal points and all intermediate stops (8, 13). Its course is prescribed, and the law permits neither deviation nor abandonment.

All of the Airlines planes were from time to time during the year 1939 in Minnesota. On May 1 (date as of which tax liability is determined) of that year a portion only of the fleet was in the State, and the presence of only a very few planes continued during the entire day (7-8, 12-13).

*Figures in parentheses refer to page numbers of the Record.

The case was submitted to the trial court—District Court of Ramsey County, Minnesota—on a stipulation of facts, which appears at pages 5 to 10 of the record, and upon this stipulation the Court made its findings, which appear at pages 10 to 16 of the record.

The action was contested by the Airlines on the ground that the levy and assessment of the tax was in violation of the commerce, due process, and equal protection clauses of the Federal Constitution and also of certain provisions of the Constitution of Minnesota. The District Court overruled the objections, held the assessment valid, and rendered judgment in favor of the State and against the Airlines for the sum of $18,266.68. Upon appeal to the Supreme Court of Minnesota, this judgment was affirmed by a divided court, the chief justice and two associate justices dissenting. The constitutional objections were raised by answer in the District Court (3-4) and by brief and oral argument in the Supreme Court. A copy of the opinions (majority and minority) of the Supreme Court of Minnesota is found in the printed record at pages 17 to 39, inclusive. The decision is reported in 213 Minn. 395 and 7 N. W. (2d) 691.

ASSIGNMENTS OF ERROR.

The Supreme Court of Minnesota erred:

1. In affirming the judgment of the District Court of Ramsey County, Minnesota.

2. In holding the tax valid.

3. In holding that petitioner's entire fleet of airplanes had a taxable situs in Minnesota.

4. In holding that any given portion of petitioner's airplanes might have a tax situs in more than one state.

5. In holding that the tax was not in violation of Section 8 of Article I of the Constitution of the United States and in refusing to hold the contrary.

6. In holding that the tax was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States and in refusing to hold the contrary.

QUESTIONS PRESENTED.

The ultimate questions presented are whether the enforcement of the tax as levied would deprive the Airlines of its property without due process of law or deny it the equal protection of the laws, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, or would place an unlawful burden on interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States.

SUMMARY OF ARGUMENT.

Minnesota is without jurisdiction to tax the entire fleet of the Airlines' planes on a full *ad valorem* basis. It can, within its constitutional power, tax only that proportion of the fleet which is regularly and habitually used in the state. A corresponding right is enjoyed and is in fact exercised by each of the other states through which the planes operate, and the authority in such other states to tax proportions of the fleet is incompatible with authority in Minnesota to tax the whole.*

The tax situs of tangible property is controlled by its "permanent" physical situs. Such property can have but one situs. This is subject, however, to the rule that different *proportions* of the same aggregate of items of tangible personal property may under certain circumstances have different situses, although each *proportion* can have but one. The familiar example is railroad rolling stock used in interstate transportation operations. Such property may be taxed by each state through which it passes only on a proportionate basis, and is not taxable in its entirety by any state. Habitual presence and use of a *proportion* of such property in any state gives that proportion a "permanent" situs in such state within the rule governing the power to tax. The rule of the rolling stock cases should be applied to commercial airplanes operated in interstate flights. Since a *proportion* of the Airlines' fleet of planes had acquired situs and was taxable and taxed in states other than Minnesota, only the remaining portion was subject to tax in the latter state. The proportion or propor-

*The Airlines route crosses the northern extremity of Idaho, but it makes no landing in that state and has not been taxed there.

tions having situs and being subject to tax in other states are beyond Minnesota's jurisdiction.

The taxation by a state of property beyond its jurisdiction constitutes the deprivation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment. If (as in this case) the property so taxed be employed in interstate commerce, there is also a violation of the commerce clause of Article I. Aside from the strict question of jurisdiction, multiple taxation of the instruments of interstate commerce constitute such a burden on that commerce as to infringe the commerce clause.

ARGUMENT.

The Taxing Statute and the Tax.

Minnesota has a taxing statute broad enough to authorize the tax if it be valid according to its literal terms. Section 272.01, *Minnesota Statutes*, 1941 (Section 1974, Mason's Minnesota Statutes, 1927) reads as follows:

> "All real and personal property in this state and all personal property of persons residing therein, including the property of corporations, * * * is taxable * * *."

Literally read, this statute would be clearly unconstitutional as authorizing the taxation of all personal property owned by residents, even though physically and permanently located elsewhere and beyond the State's jurisdiction. However, in the tax proceeding it did not appear that the right to tax was predicated upon this statute. It does now so appear from the State's brief. Regardless of any apparent statutory authority, the enforcement of the tax would violate the Airlines' constitutional rights.

I.

The Tax Violates the Due Process Clause of the Fourteenth Amendment.

It is axiomatic that a state's power of taxation is limited by its territorial jurisdiction and is confined to property having a situs therein. Situs of tangible personal property, like that of land, is physical. Permanent physical situs and tax situs coincide. Domicile of the owner determines the situs of such property only when physical situs elsewhere does not appear.

ROLLING STOCK CASES.

The problem of tangible personal property habitually moving through and between states and not resting permanently in any was presented in the railroad rolling stock cases. Situs was attributed to *proportions* of such property rather than to individual items. Accordingly, the power to tax was apportioned on an average basis, each state being permitted to tax only the proportion of the rolling stock or equipment habitually employed in the state and being denied the right to tax such property in its entirety. Various formulae devised by state taxing authorities reasonably calculated to accomplish apportionment were approved. Some were condemned. *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *American Refrigerator Transit Company v. Hall*, 174 U. S. 70; *Union Refrigerator Transit Company v. Lynch*, 177 U. S. 149; *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194; *Union Tank*

Line Company v. Wright, 249 U. S. 275; *Pullman Company v. Richardson*, 261 U. S. 330; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158. The rule could be stated in broader terms, but the foregoing covers the case.

In *Johnson Oil Refining Co. v. Oklahoma*, supra, the facts were that the Refining Company, an Illinois corporation, operated a refinery in Pawnee County, Oklahoma, from which it shipped oil in its own tank cars into many states. A tax laid by Oklahoma on the entire fleet of cars was held to be in violation of the due process clause of the Fourteenth Amendment. This Court said:

> "When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

In *Union Refrigerator Transit Company v. Kentucky*, supra, an attempt was made by the State of Kentucky to tax in its entirety an aggregate of railroad cars owned by the Transit Company, a Kentucky corporation, portions of which were habitually used in other states by shipper lessees. This tax was also held to be in violation of the Fourteenth Amendment. As illustrating the rule of apportionment which must be applied in such cases, the Court said, referring to its previous decision in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18:

> "We have also held that, if a corporation be engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run."

In *American Refrigerator Transit Co. v. Hall,* supra, this Court sustained a tax by the State of Colorado based upon the average number of the Refrigerator Company's cars employed in the state during the period in question, with this comment:

> "We think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

The facts of these cases are indistinguishable in principle from those in the case at bar, and the rule there established should be applied here. There is nothing in the nature, function or manner of operation of airplanes that sets them apart from railroad cars, so far as the necessity and propriety of the rule of apportionment is concerned. There is the same movement of transportation equipment through and between states over fixed routes of travel, the same continuous process of change in the individual items present in each state according to the requirements of the

business, the same habitual employment of a proportion of the equipment in each of the states served, the same character of service rendered, and the same adaptability to taxation on an average or proportionate basis. The power of the states over which the movement occurs to tax cannot be variously affected by dependence on whether the movement of the equipment happens to be through the air, on the ground, or over the waters. The Court below* agreed that the case of airplanes was indistinguishable from that of railroad cars, when it said:

> "We concede that the principle of the Pullman Car case is as applicable to planes as it is to railroad cars * * *."

The case here referred to is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

As further aligning this case with the rolling stock cases, the Court below also agreed that some proportion of petioner's airplanes had acquired a situs in other states and to that extent were taxable there, and that the power of each such state to tax was limited to the average number of planes within its borders during the tax period. But while limiting the power of other states to taxation on a proportionate basis, it conceded to Minnesota power to tax the fleet in its entirety. This is without precedent and would place the relative rights of the states upon a basis heretofore unheard of in the field of taxation.

While the Court expressly recognized that specific items of tangible personal property which had acquired a tax situs in another state could not be taxed by the state of the owner's domicile, it inconsistently held that *proportions* of such

*The words "Court below" are used for brevity in reference to the Supreme Court of Minnesota.

property which had acquired such other situs could still be taxed at the domicile. The decision may therefore be said to rest upon a supposed distinction between tangible personal property represented by specific items and tangible personal property represented by proportions. This is illogical and contrary to the rolling stock cases. The supposed distinction disregards the conception which permits taxation of different *proportions* of the same property by different states. Situs in such cases is based upon habitual use. Habitual use of a *proportion* is deemed for tax purposes the legal equivalent of permanent location of specific items equal in the aggregate to the given proportion. In either case the tax is upon *tangible* personal property. There is nothing else to tax. This is merely like saying that a tax upon an undivided interest in land is a tax upon real estate. A *proportion* is no more capable of having a permanent location or situs in two different states, and therefore of being taxable in both, than any individual item of the tangibles represented in the proportion. Hence the situs of a proportion of defendant's planes beyond the state (as found by the Court below) just as effectively removes that proportion from the State's jurisdiction as would a foreign situs of specific planes.

GROUNDS OF DECISION BELOW.

The grounds upon which the majority below thought the tax could be sustained are summarized in the paragraph of its opinion appearing on page 28 of the Record. This summary can perhaps be taken also as fairly representing the position of the State. The factors emphasized are: (1) that the Airlines was incorporated and had its principal place

of business in Minnesota; (2) that all of defendant's airplanes were at some time during the year in the State and major repairs were made there, and (3) that the Airlines shared in the benefits of the government and laws of the State.

DOMICILE AND MAIN OFFICE NOT CONTROLLING.

That the Airlines was chartered by Minnesota is not a controlling fact as to tangible property having a tax situs elsewhere. That the doctrine of *mobilia sequunter personam* is inoperative in such cases has come to be universally recognized. The personal property in question (proportion of planes habitually used outside Minnesota), as found by the Court below, had acquired a tax situs in other states. That excludes it from taxation by Minnesota. *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Frick v. Pennsylvania,* 268 U. S. 473.

In the *Union Refrigerator Transit Company* case (to which previous reference has been made), this Court condemned an attempt by Kentucky, the company's domicile, to tax its rolling stock employed in other states. The Court below thought this case distinguishable from the instant case on the narrow ground that in the *Transit Company* case some of the cars were never physically in Kentucky during the tax period, while in the present case it was found that, although only a part of the Airlines' fleet had been in Minnesota on May 1, 1939, the assessment valuation date, all of its planes had been in the State at times during the year. The decision in the *Transit Company* case does not rest upon any such narrow distinction,

and it becomes at least doubtful that the Court below correctly construed the language of the opinion when it is read in the light of the facts as they appear from the findings of the County Court of Kentucky, not questioned on appeal. The County Court determined:

> "* * * that the transit company was the owner of two thousand cars in September, 1897, 1898, 1899, and 1900 * * * ; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list *such a proportion** of its cars as *under a system of averages* upon their gross earnings were shown to be used in the state of Kentucky during the fiscal year, the court finding *by this method* that there were subject to assessment in Kentucky twenty-eight cars for the year 1897, twenty-nine for the year 1898, forty for the year 1899, and sixty-seven for the year 1900." (p. 195 of 199 U. S.).

This finding obviously does not refer to any particular twenty-eight, twenty-nine, forty, or sixty-seven cars, but to the *average number* of cars in the state during the respective years in question. The ratio may render it improbable that each of the two thousand cars was at any time in the state during any year, but that is not impossible. If the Court considered the point of any decisive significance, some comment might have been expected upon it. When the Court referred to the property involved as being "permanently located in other states and employed there," it may well have referred to the *proportion* of the company's cars so located and used rather than to specific cars. It is hardly conceivable that the decision of this Court would have been different had it affirmatively appeared that all of

*All italics appearing in quotations herein are supplied for the purpose of emphasis.

the Transit Company's cars had at some time during the year been temporarily in Kentucky.

That the location in Minnesota of the Airlines' main business office and hangar for major repair work is not of controlling significance is determined by the decision in *Johnson Oil Refining Co. v. Oklahoma,* 290 U. S. 158. The Refining Company used its own fleet of tank cars for the shipment of its products into various states. After making deliveries the cars returned to the refinery, where they were repaired as needed, refilled, and reshipped or held for later use. The refinery was definitely the operational headquarters of the company. Yet a tax by Oklahoma on the entire fleet of cars was held invalid, the Court saying:

> "The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other states."*

The corporate domicile and business headquarters of the Airlines could at most draw the property in question to the jurisdiction of Minnesota for taxation only if that property had no tax situs elsewhere. It did have a tax situs elsewhere. With this the Court below agreed.

The significance of the date May 1 referred to in the stipulation, findings, and decision arises from a statutory provision which reads:

> "Personal property shall be listed and assessed annually with reference to its value on May 1, and if acquired on that day shall be listed by or for the per-

*That the decision in the Johnson Oil Refining Company case may have a significance beyond that attributed to it by the majority below appears to be conceded by the observation respecting it (26):

> "Broad language was used by the Court in its opinion and, as ably shown by the dissenting opinion of Mr. Justice Loring, it is reasonably susceptible of more than one interpretation."

son acquiring it." (Section 273.01, Minnesota Statutes, 1941; Section 1984, Mason's Minnesota Statutes, 1927).

On May 1, 1939, only a part of the Airlines' fleet of airplanes was in the State of Minnesota at any time during the day, and of the fifteen planes that were in the State on that day only eight were in the State during the entire day (8, 12-13).

In its brief in opposition to the petition for certiorari, the State suggests (p. 3):

> "And for all that appears, all of said fleet was in Minnesota on May 1, 1939, the assessment date."

It was stipulated and found that:

> "On May 1, 1939, there were present in the State of Minnesota for at least a part of the day the following listed airplanes belonging to the defendant and *constituting a part of its entire fleet* * * *." (8, 12-13)

This is the only reference in the record to the matter and leaves it clear that on May 1, 1939, there was in Minnesota a part only of the petitioner's fleet of planes.

TAX NOT JUSTIFIED ON THEORY OF "EQUIVALENT" OF PROTECTION.

The authority to tax is also predicated upon supposed governmental protection given in return by the State of Minnesota. One of the authorities cited in support of this theory is *Union Transit Company v. Kentucky*, 199 U. S. 194, in which the Court said:

> "The power of taxation * * * is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his property * * *."

The equivalence here spoken of does not require that the benefits of government be appraised in dollars and cents and balanced against the tax. It does, however, require at least a theoretical "equivalent" having some minimum limit. Also the protection and benefits must be with respect to the particular property in question rather than to the taxpayer generally. Defendant's franchise to exist as a corporation under the laws of Minnesota and the privilege of exercising corporate management and business direction in that state is obviously not such a benefit in relation to the corporation's tangible property located elsewhere as to authorize the taxation of that property. *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Frick v. Pennsylvania,* 268 U. S. 473. It can always be said in a sense that the government and laws of a corporation's domicile upon which it depends for its existence are a benefit and protection to the business and property of the corporation, wherever located. This is not the kind of benefit and protection spoken of by the courts. The benefits must have a more direct relation to the property. The impossibility of an "equivalent" in the present case seems self-evident. The majority opinion below recognizes the right of other states to tax a *proportion* of defendant's planes on the assumption, presumably, that those states give in return an equivalent of protection. Such an assumption precludes justification of a like tax by the State of Minnesota upon the same property on the theory of another equivalence of protection. If such a claim be sustained, then a dozen or more states traversed by an air route might with equal show of right impose a full tax upon the air transport company's entire

fleet of planes upon the pretext of an equivalent of protection. The havoc which might be wrought upon this industry by such a doctrine can readily be seen.

The Court below was right in recognizing the authority of other states to tax on an average basis the proportion of the property employed in those states and receiving from them essentially the same character of benefit and protection as afforded by Minnesota in respect of the proportion there, but was wrong in the view that the like benefit and protection afforded by the latter state gave it a superior right.

DECISIONS CONCERNING TAXATION OF INTANGIBLE PROPERTY CONTRASTED WITH THOSE DEALING WITH THE TAXATION OF TANGIBLE PROPERTY.

It is apparent that the view of the majority below was decisively influenced by the supposed implications of certain opinions of this Court written in cases involving the taxation of intangibles only, including particularly *State Tax Commissioner v. Aldrich*, 316 U. S. 174, *Curry v. McCanless*, 307 U. S. 357, and *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435. The *Aldrich* and *McCanless* cases are apparently construed as erasing all distinction between tangible and intangible personal property as respects multiple tax situses and liability to tax in more than one state. "*Property*", the Court said, "may have a situs in more than one state. * * *" The *Aldrich* and *McCanless* cases have no such broad implication. They were concerned with transfer taxes upon intangibles, and jurisdiction to tax was discussed only in terms of intangibles and of the nature

and characteristics of that class of property. There was a careful avoidance of indiscriminate reference to personal property generally or the inclusion of tangibles with intangibles. In the *Aldrich* case, as the Court below observed, *First National Bank v. Maine,* 284 U. S. 312, was overruled, and *Blackstone v. Miller,* 188 U. S. 189, was reinstated. But again both of these cases dealt only with succession taxes on intangibles. It is important to note that there has been no overruling of *Frick v. Pennsylvania,* 268 U. S. 473, or of *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341, or of the decisions in the rolling stock cases. These are the cases that established the rule with reference to the taxation of tangibles. In the *Frick* case, this Court held Pennsylvania to be without power to impose a tax on transfer by death of a Pennsylvania resident in respect of tangible personal property located elsewhere. The State urged as authority for the tax *Blackstone v. Miller* and a subsequent case. The comment of this Court was:

> "Both cases related to intangible personalty, which has been regarded as on a different footing from tangible personalty. When they are read with this distinction in mind, * * * it is apparent that they do not support the tax in question."

The same distinction is implicit in *Curry v. McCanless,* 307 U. S. 357, involving inheritance and succession taxes upon intangible property in which the opinion spoke of the "cleavage between the rules of law applicable to tangibles and those relating to intangibles", and said:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located * * * for purposes

> of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

And later added:

> "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things."

For another decision drawing the same distinction, see *Blodgett v. Silberman*, 277 U. S. 1. In *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 209, it was said:

> "When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception."

It is noteworthy that all of the decisions cited in the *Aldrich* case as supporting that decision and as condemning *First National Bank v. Maine* (with one exception not here significant) are decisions involving the taxation of intangible property. There is nothing in these cases marking a departure from the established rule that tangible personal property can have but one situs, and therefore can be but once taxed.

II.

The Tax Is in Violation of the Commerce Clause.

Ordinary property taxation imposed on tangible property employed in interstate commerce does not amount to an unconstitutional burden on that commerce, so that the mere fact that the Airlines' planes are flown in interstate commerce does not wholly remove them from state taxation. In general it has been said also that double taxation is not forbidden by the Constitution. However, there appears to be no decision of this Court directly on the question of whether double or multiple taxation of the tangible instruments of interstate commerce is permitted by the commerce clause. The principle established by other cases condemns such taxation and therefore condemns the imposition by the State of Minnesota of a full ad valorem tax upon the Airlines' planes which are taxable and are being taxed on a proportionate basis by other states by virtue of their use therein as an incident of interstate commerce.

Explaining the basis of unconstitutionality of taxes measured by gross receipts from interstate business, this Court, in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 255, said:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature *as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause *it would bear cumulative burdens not imposed on local commerce.*"

In *Adams Manufacturing Company v. Storen*, 304 U. S. 307, 311, this Court said with respect to a gross income tax:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce • • •. Interstate commerce would thus be subjected to the risk of a *double tax burden* to which intrastate commerce is not exposed, and which the commerce clause forbids."

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439-40, this Court said of a similar tax of the State of Washington:

> "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, *the risk of a multiple burden to which local commerce is not exposed.*"

In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 45, it was said of cases condemning taxes under the commerce clause that:

> "The decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage."

And again:

> "License taxes requiring a corporation engaged in interstate commerce to pay a fee of a certain percentage of its capital stock have been rejected *because of the danger that each state in which the corporation does business may impose a similar tax* measured by its interstate business in all, * * * and have only been sustained *when apportioned* to that part of the capital thought to be attributable to an intrastate activity."

And further that:

> "Privilege taxes requiring a percentage of the gross receipts from interstate transportation or from other activities in carrying on the movement of that commerce, which, if sustained, *could be imposed wherever the interstate activity occurs,* have been struck down for similar reasons."

In *Western Live Stock v. Bureau of Revenue,* supra, the method of taxation upheld in that case was described as:

> "A practical way of laying upon the commerce its share of the local burden *without subjecting it to multiple taxation not borne by local commerce* and to which it would be subject if gross receipts *unapportioned* could be made the measure of a tax laid in every state where the commerce was carried on."

In *Coverdale v. Pipe Line Co.,* 303 U. S. 604, 612, the Court recited as one of the characteristics giving validity to the tax there under consideration:

> "The tax *is without discrimination* in form or application as between inter- and intra-state commerce, *and it cannot be imposed by more than one* state."

The present tax has inherently the vice which condemned other forms of taxation, as indicated by the foregoing excerpts quoted from the opinions of this Court. The property here taxed is not only capable of being taxed with equal right by every other state through which the airplanes move in the course of interstate commerce, but are there actually being taxed. As a result of Minnesota's insistence upon a full ad valorem tax, the property is being made to bear a cumulative multiple burden not imposed on intrastate commerce or similar property used in such commerce. There is therefore a clear discrimination against interstate as compared with intrastate commerce. Incidentally, it is, of course, only because of its need for interstate commerce use that the Airlines owns and operates the large fleet of planes which are the object of the tax. For any possible intrastate business there would be need of very few.

From every practical point of view the same objections to an unapportioned tax on the proceeds of interstate commerce apply to the present tax. An unapportioned tax on the instruments of that commerce capable of being taxed in many states offers comparable possibilities of burden on and interference with such commerce.

In the majority opinion below the commerce clause was waved aside with the comment:

> "Property engaged in the transportation of interstate commerce may be subjected by a state to the usual nondiscriminatory property taxes if jurisdiction to tax otherwise exists." (Citing *Pullman Palace Car Company* and *Johnson Oil Refining Company* cases.) (30)

The two cases cited give approval only of taxes based on the average or proportionate basis, and the opinions give no indication of a view that multiple taxation of property employed in interstate commerce is permitted by the commerce clause. The natural inference is to the contrary.

III.

The Steamship Cases Are Not Analogous.

The State has urged that the guide to a proper determination of this case is to be found in certain decisions of this court in cases involving the taxation of steamships and other water craft. The leading case in this group is *Hayes v. Pacific Mail Steamship Company,* 17 How. (U. S.) 596. The last case in the series is *Southern Pacific Co. v. Kentucky,* 222 U. S. 63.

Various nondomiciliary states attempted to tax ships, claiming situs by virtue of visits of the ships at the ports of the taxing states. There was no question of apportionment, the port states assuming the right to tax the full value of individual vessels. The right of these states to so tax was denied generally upon the view that the visits of the vessels at the ports in question were too short, irregular, or uncertain to furnish sufficient basis for a tax situs superseding the domiciliary situs. The decisions were largely influenced by certain general concepts of the nature of water navigation and (especially in the earlier cases) the effect of the registration and enrollment required by Federal maritime statutes and the resulting significance of the so-called "home port" and its relation to the owner's domicile.

In the leading case of *Hayes v. Pacific Mail Steamship Company,* the court stressed the fact that the vessels in question (which were plying between New York, San Francisco, and Portland) were engaged in "navigating the waters of the ocean" and "were engaged in the commerce of the country upon the highway of the nations." It was said that the particular vessel in question was within the jurisdiction of any of the states visited only temporarily "and for a purpose wholly excluding the idea of permanently abiding in the state." How there could be any tax by the port states on a proportionate basis is difficult to see. On any basis of route mileage or ship mileage or under any permissible formula which could be suggested, any tax to which California would be entitled would be wholly insignificant.

Morgan v. Parham, 16 Wall (U. S.) 471, emphasizes the same considerations. A vessel owned and registered in New York was plying between Mobile and New Orleans, and was held not taxable in Alabama upon the ground, among others, that

> "* * * the vessel was lawfully engaged in interstate trade over the public waters. It is in law as if the vessel had never before or after that day been within the port of Mobile, but touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city."

That even in the case of ships the situs of domicile and port of enrollment must yield to permanent physical situs arising from habitual use and employment is established by *Old Dominion Steamship Co. v. Virginia,* 198 U. S. 299. Certain ships owned by a Delaware corporation which were

registered and enrolled in that state were used on the inland waters of Virginia, connecting with larger ocean-going vessels operating from the connecting points to destinations outside the state. This gave the operation of the vessels in question the character of interstate commerce. They were held taxable in Virginia as against the contention that only Delaware could tax. Suppose these ships instead of being employed solely in Virginia had in a similar manner been operated in both Virginia and North Carolina. Could there, under this decision, be any escape from the necessity of an apportionment between those two states? Apparently not.

In *Ayer & Lord Co. v. Kentucky,* 202 U. S. 409, the state of domicile and state of registry were rivals for authority to tax certain vessels. The decision was for the state of domicile. The Court, after reviewing the history of Federal legislation concerning the registry and enrollment of vessels, said:

> "The general rule has long been settled, as to vessels plying between the ports of different states engaged in the coast-wise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, * * * subject, however, to the exception that where a vessel engaged in interstate commerce *has acquired an actual situs* in a state other than the place of domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

The opinion in the case of *Southern Pacific Co. v. Kentucky,* 222 U. S. 63, reviewed the previous cases and held that vessels engaged in coast-wise shipping were subject to taxation at the domicile of the owner "since that is the

situs assigned to tangibles *where an actual situs has not been acquired elsewhere.* Some of the considerations moving the Court appear from the following observations:

> "To lay down a principle that vessel property has no situs for purposes of taxation other than the actual permanent location would introduce elements of uncertainty concerning the situs of such property *not presented by other kinds of movable property*
>
> "* * * A ship is not intended to stay in port but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty *as to result often in an entire escape from taxation.*"

A solution for the problem of taxation of airplanes engaged in interstate operations is not to be found in the steamship cases and the Court below correctly concluded that the true analogy is furnished by railroad rolling stock cases.

CONCLUSION.

This case is one of grave concern not only to the petitioner but to the entire air transport industry, and in fact to all state governments and to the general public. To the Airlines the Minnesota tax carries a threat of multiple taxation of its aircraft which may become a burden of the most serious proportions. Indeed, should the tax be sustained, the Airlines will immediately be subject to multiple taxation of its airplanes. The gravity of the issue to the general industry is enhanced by the facts, first, that

air transportation is essentially interstate in character, more predominantly so than even the railroads, and, second, that airplanes are highly expensive equipment and represent a very large portion of the capital investment of all operating companies, and are subject to relatively rapid depreciation. These factors peculiarly expose flying equipment to the menace of multiple taxation and aggravate the severity of the burden of such taxation.

All of the states served by interstate airlines are concerned in obtaining an equitable share of the revenues to be derived from the legitimate taxation of the aircraft coming within their proper jurisdictions. The only basis on which a just and equitable allocation of those revenues can be accomplished is that of apportionment according to the rule of the rolling stock cases. Without the restraining effect of that rule will come conflict and confusion and unfortunate rivalry for advantage between the states.

That it is important to the national economy that the air transport industry shall continue to enjoy a normal, unhampered development needs no emphasis. That an inordinately onerous system of taxation may adversely affect the course of that development is not open to question.

The interests of all concerned would be promoted by the fair, orderly, and nondiscriminatory exercise of the taxing privilege that would be assured by the enforcement of the doctrine of apportionment. The legal justification—in fact the constitutional necessity—for giving effect to that doctrine has been made to appear. Fortunately it happens that sound constitutional principles, public policy, and the interests of the industry all coincide in respect to

the solution of the problem by which they would best be served.

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. [redacted] 33

NORTHWEST AIRLINES, INC.,

vs. Petitioner,

STATE OF MINNESOTA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 882

In the Matter of the Proceedings to Enforce Payment of Delinquent Personal Property Taxes for the Year 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR THE STATE OF MINNESOTA IN OPPOSITION.

Opinion Below.

The findings of fact and conclusions of law of the District Court (R. 10-16) are not officially reported. The opinion of the Supreme Court of Minnesota (R. 17-39) is reported in 7 N. W. (2nd) 691 (Advance Sheets).

Jurisdiction.

Jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court (R. 18-39) violates the 14th Amendment to the United States Constitution and that the decision is in conflict with the holdings of this court. While a Federal question is presented, it is not shown that the decision is in conflict with the holdings of this court.

Question Presented.

Whether a personal property tax laid by the State of Minnesota on the fleet of planes operated by the petitioner in interstate commerce to and from Minnesota violates Article 14, Section 1 of the Constitution of the United States.

Statute Involved.

The statute under which the tax in question was levied is Minnesota Statutes 1941, Section 272.01 (Mason's Minnesota Statutes 1927, Section 1974) and reads as follows:

> "All real and personal property in this State, and all personal property of persons residing therein, including the property of corporations * * *, is taxable, except such as is by law exempt from taxation."

Statement.

The State of Minnesota laid a personal property tax upon a given number of planes, according to the value of each plane, belonging to the petitioner for the year 1939 (R. 13-14, f. 26-27). The planes in question were flown in interstate commerce to and from Minnesota (R. 5-6, f. 10-11), and were continuously engaged in flying from state to state, except for brief stops at airports (R. 7, f. 14); and were in

Minnesota enroute, carrying passengers and the mails, or for major repairs or periodical overhauling, St. Paul, Minnesota, being the home port (R. 7-8, f. 14-15) and the base of major repairs and overhauling (R. 6, f. 11). And, for all that appears, all of said fleet was in Minnesota on May 1, 1939, the assessment date (R. 8, f. 15). The petitioner was domiciled in Minnesota and maintained its principal place of business and executive offices there (R. 5, f. 10), from which the system was directed and controlled.

The case was tried upon stipulated facts (R. 5-10). It was the position of the petitioner that only a portion of the full value of the fleet could be taxed by respondent, based upon the proportion of mileage in Minnesota (R. 9, f. 16). The trial court concluded that the petitioner's planes had a situs for taxation in Minnesota and not elsewhere (R. 15, f. 29) and that the tax was nondiscriminatory (R. 30, f. 48). The judgment of the trial court was affirmed by the state supreme court (R. 18-39).

ARGUMENT.

I.

The Decision Is in Accord with the Holdings of This Court.

The basis of the court's decision as expressed by it, is as follows: "The power of this court over defendant (petitioner) and the property taxed was present. Defendant was incorporated here. Its principal place of business is located in this state, and all the planes at some time or another come within its borders. The benefits conferred upon defendant (petitioner) by the government and laws of this state in relation to all defendant's (petitioner's) planes is equally clear. The policies and decisions made by defendant (petitioner) in connection with the operations of its planes were made here and under the protection and bene-

fits of the laws of this state. The manner and extent of their operation were determined and directed from this state. Particularly significant is the fact that when planes were in need of major repairs and overhauling the necessary repairing and overhauling were done here. These benefits did not cease the moment the planes crossed the border into another state. They continued and contributed to the successful operation of the planes throughout the course and scope of their operations.

There is, therefore, no violation of due process in the taxation by this state of all the planes. There was a fair basis in the power of this state over defendant (petitioner) and its planes and the benefits conferred with respect to this property upon which the tax may rest. We hold, therefore, that the tax here in question on all the planes was a valid one" (R. 28-29, f. 46-47).

The decision is consistent with *State Tax Commission* v. *Aldrich*, 316 U. S. 174, 86 L. Ed. 1358; *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435, 85 L. Ed. 267; *Curry* v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339. It was on this basis that the court declared that the tax did not offend the 14th Amendment.

The petitioner seeks to distinguish the Aldrich case because involved therein was a tax upon intangibles. That case did not turn upon the nature of the property, whether tangible or intangible, but upon the relationship of the state to the person or property taxed; upon the benefits conferred and the protection afforded by the laws of Utah. So in the instant case, protection and benefits of inestimable value flow from the State of Minnesota and its laws to the petitioner and the property taxed.

The petitioner's views are based upon such cases as *Frick* v. *Pennsylvania*, 268 U. S. 473 and *Delaware L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, which were concerned

with tangible property (in the former it was an art collection) permanently located outside of the state of the owner's domicile. Such a tax was held to violate the 14th Amendment because the property was under the exclusive jurisdiction of another state and did not receive any protection or benefits from the laws of the domiciliary state.

II.

The Rolling Stock Cases Are Not Applicable.

The petitioner contends that the court should have held these planes were not taxable according to their full value under the doctrine of the rolling stock cases. It is the respondent's position that the doctrine of these cases is inapplicable here; that even if such doctrine were applicable, the petitioner failed to bring himself within it; and that as a result thereof under the decisions of this court the exclusive jurisdiction to tax is in the state of domicile.

The rule of the rolling stock cases is that when rolling stock is permanently employed within a foreign state or an average number of cars is so permanently employed therein, jurisdiction exists in that state to tax that number of cars. In all of the cases cited by the petitioner, except *Union Refrigerator Transit Company* v. *Kentucky*, 199 U. S. 194, the tax was laid by a foreign state on the average number of cars found to be permanently employed therein. In the latter case, it appeared that though the corporation was domiciled in Kentucky, the headquarters for its cars was in Milwaukee, Wisconsin, at which place they were rented to shippers. As to these cars, the court denied the right of Kentucky to tax them because they were permanently located in another state.

In *Johnson Oil & Refining Co.* v. *Okla.*, 290 U. S. 158, strongly relied upon by the petitioner, a tax was levied by Oklahoma, a foreign state (Illinois being the domicile),

upon the company's entire fleet of 380 tank cars, when only an average of sixty-four were permanently located within the state. It was held Oklahoma had jurisdiction to tax only the 64 cars. But the court declared Illinois could tax the entire fleet if it had not acquired an actual situs elsewhere.

Application of this rule to aviation presents practical difficulties. The petitioner has through flights between Minneapolis, Minnesota and Chicago, Illinois passing over Wisconsin without stopping therein. Likewise on all flights to and from Oregon and Washington state, it passes over Idaho without stopping therein (R. 10-11, f. 20-20). Under the doctrine of the Rolling Stock cases, there is no basis for taxation in these states. How could the rule be applied? What protection or benefits flow from such states? The right to use the air is a federal right. Furthermore none of the cases support a claim for "proportional" taxation. The right to tax is limited to such items of property or an average number of such items as are permanently located within the state.

The tax in the instant case, is presumed to be valid until the contrary is shown. The burden rests upon the petitioner to establish that these planes come within the rule of the Rolling Stock cases. In this it has failed. There is no finding that any of these planes acquired a situs for taxation in any foreign state. The stipulation and findings of fact provide that these planes were constantly in flight from state to state (R. 7, f. 14; R. 12, f. 24), stopping only to discharge passengers; and were in Minnesota enroute (R. 12-13, f. 24-25), and for overhauling (R. 6, f. 11), or for major repairs, this being the home port (R. 13, f. 26). Thus they were probably in Minnesota more frequently and for a greater period of time than elsewhere. The majority opinion of the court states "Neither the stipulation nor the

findings of fact are as clear as one could wish on whether such an average number of planes was so constantly and permanently in any one state (other than state of domicile) as to acquire a situs there" (R. 23, f. 40). Having failed in its burden, it would appear that the domiciliary state may tax the entire fleet. *N. Y. C. & H. R. R. Co.* v. *Miller*, 202 U. S. 584; *Southern Pacific Company* v. *Kentucky*, 222 U. S. 63; *Johnson Oil Refining Company* v. *Oklahoma, Supra.*

III.

The Decision Is Sustained by the Steamship Cases.

The aviation systems of the nation which were national in character yesterday are international in character today. Aviation has revolutionized communications between the nations of the earth to an even greater extent than did the steamship. The court judicially knows of the established routes to Europe, South America, Africa, Asia and the South Pacific. Distances that required weeks of travel are now reached by air in a matter of hours or days. It has long been held to be the established rule by this court that ships whether engaged in commerce in the inland waters, the coastwise trade, or among the nations are taxable only at the domicile of the owner, because their stops, whether regular or casual, at various ports are but temporary and without any intention of permanently abiding at such places. The doctrine is as applicable to planes as to ships, and if so applied would avoid the necessity of having one rule for interstate aviation and another for international aviation. Applied to aviation, such a rule, tried and proven in water transportation, would solve this problem of taxation. *Hayes* v. *Pacific Mail S. S. Co.*, 58 U. S. (How.) 596; *Morgan* v. *Parham*, 83 U. S. (Wallace) 471; *Ayer Lord & Tie Company* v. *Ky.*, 202 U. S. 1082; *Southern Pacific Com-*

pany v. *Ky., Supra.* While this is not the ground upon which the court below based its decision, it could well have been founded upon these cases and is adequate grounds for affirmance.

Conclusion.

The decision of the Supreme Court of the State of Minnesota is in accord with the applicable decisions of this court. It is therefore respectfully submitted that the petition for a Writ of Certiorari be denied.

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April, 1943.

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Supreme Court of the United States

October Term, 1943

No. 33

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF FOR RESPONDENT.

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October, 1943.

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Supreme Court of the United States

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No. 33

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The findings of fact and conclusions of law of the District Court (R. 10-16) are not officially reported. The opinion of the Supreme Court of Minnesota (R. 17-39) is reported in 213 Minn. 395; 7 N. W. (2nd) 691.

JURISDICTION.

The judgment of the Supreme Court of Minnesota was entered December 31, 1942 (R. 39). The petition for writ of Certiorari was filed April 3, 1943, and granted May 10, 1943. Jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court (R. 18-39) violates the due process and commerce clauses of the United States Constitution and that the decision is in conflict with the holdings of this court.

QUESTION PRESENTED.

Whether a non-discriminatory personal property tax laid by the State of Minnesota on the fleet of airplanes operated by the petitioner, a Minnesota corporation, in interstate and foreign commerce to and from Minnesota violates Article 14, Section 1, and Article 1, Section 8, of the Constitution of the United States.

STATUTES INVOLVED.

The statutes under which the tax in question was levied are Minnesota Statutes 1941, Section 272.01 (Mason's Minnesota Statutes 1927, Section 1974) and reads as follows:

> "All real and personal property in this State, and all personal property of persons residing therein, including the property of corporations * * *, is taxable, except such as is by law exempt from taxation."

Minnesota Statutes 1941, Section 273.01 (Mason's Minnesota Statutes 1927, Section 1984):

> "* * * personal property shall be listed and assessed annually with reference to its value on May 1 * * *".

and Minn. Statutes 1941, Sec. 273.02 (Mason's Minnesota Statutes 1927, Section 1985):

> "If any * * * personal property be omitted in the assessment of any year or years, and the property thereby escape taxation, when such omission is discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted; and he shall assess the property, and extend against the same on the tax list for the current year all arrearages of taxes properly accruing against it * * *".

STATEMENT OF THE CASE.

For the convenience of the Court, a statement of the case is herein set forth. The petitioner is engaged in the business of carrying persons, property and mail in interstate and foreign commerce by airplane on regular schedules between Chicago, Illinois and Portland, Oregon, and Seattle, Washington, and to Winnipeg, Manitoba, Canada, via certain cities in Wisconsin, Minnesota; North Dakota, Montana and Washington. It also operated regular scheduled flights from Minneapolis, Minnesota, to Chicago, Illinois, without intervening stops (R. 10-11, ff. 20-21). The petitioner is a Minnesota corporation with its principal place of business at the St. Paul Municipal Airport, St. Paul, Ramsey County, Minnesota (R. 10, f. 20), where it maintained its airplane and engine overhaul base at which prin-

cipal repairs to its engines and planes were made (R. 11, f. 21); and all of its planes were registered with the United States Civil Aeronautics Authority with St. Paul as their home port (R. 13, f. 25). All of petitioner's planes were in Minnesota from time to time during the year 1939 enroute carrying passengers, property and mail and for periodical overhauling. On May 1, 1939, the assessment date, 15 of petitioner's planes were in Minnesota (R. pp. 12-13, ff. 24-25). At some stops along its route, petitioner had maintenance bases where minor repairs were made; also certain employees such as radio operator, station manager, ticket seller, etc., and at all stops it owns or leases space for office and hangars (R. 11, f. 22). Petitioner's flight operations were subject to the jurisdiction of the United States Civil Aeronautics Authority and were made pursuant to a certificate of public convenience and necessity (R. 13, f. 25). The Civil Aeronautics Authority maintained at regular intervals along petitioner's route radio range courses and emergency landing fields. But the regular course was abandoned whenever weather conditions required it (R. 12, f. 23). Total length of petitioner's route was 2,466 miles; in Minnesota, 320.2 miles or 14%; the total plane mileage on May 1, 1939, the assessment date, was 14,414 miles; in Minnesota, 2,348.4 miles or 16% (R. pp. 14-15, ff. 27-28). Petitioner's planes were constantly changing from place to place along the route. They were continuously engaged in flying from state to state except for brief stops at airports and except for occasional layups for repairs (R. p. 12, f. 24). Petitioner paid personal property taxes on some part of its fleet in Illinois, Wisconsin, North Dakota, Montana, Oregon and Washington in 1939 (R. p. 14, f. 27).

For the year 1939, petitioner filed a personal property tax return and included therein planes of the true and full value of $77,000. Thereafter an additional assessment of omitted property, consisting of the remainder of petitioner's planes as of May 1, 1939, of the true and full value of $511,500 was made, resulting in a tax in the sum of $16,913.60. Upon failure to pay this tax, it was included in the delinquent tax list to which petitioner interposed an answer (R. pp. 13-14, ff. 26-27). Findings and Judgment for the respondent (R. pp. 15-16) were affirmed by the Supreme Court (R. pp. 17-39).

ARGUMENT.

SUMMARY OF ARGUMENT.

The Minnesota Supreme Court sustained a non-discriminatory ad valorem personal property tax upon the petitioner's fleet of planes, instrumentalities of interstate and foreign commerce, upon the ground that the owner is domiciled in Minnesota which has jurisdiction of the property. The tax does not violate the due process clause of the Federal Constitution because these planes are in Minnesota as much if not more than in other states and receive benefits of and protection from the laws of that state.

The petitioner has failed to sustain the burden of proving the tax illegal. It does not appear that any other state has acquired the *right* to tax any of these planes. They are in constant flight from state to state stopping only temporarily in some of them to take on or discharge passengers or cargo. The contention that the rolling stock

cases apply fails because it is not shown and cannot be shown that such an average number of the planes were so constantly present in any state beyond the domicile as to acquire a situs therein. Petitioner concedes that "Domicile of the owner determines the situs of such property only when physical situs elsewhere does not appear". (Petitioner's Brief, p. 8).

Nor is there any basis for the claim that there is precedent in the rolling stock cases for the principle that a domiciliary state is limited in its jurisdiction to tax a proportion because of the use of the property in other states. These cases permit a foreign state to tax according to their full value, the average number of items of rolling stock constantly within its borders, irrespective of the rights of other states. There is no requirement to apportion. It is impractical to apply the principle of the rolling stock cases to airplanes because of their tremendous speed which makes it possible to operate regular scheduled transcontinental passenger and cargo service with very few ships. In 1939 all the domestic air carriers in the United States had in service and reserve only 265 planes. So that if it could be applied, the same planes would have a situs for taxation in many states. Further different rules would be required for the taxation of planes engaged in non-stop flights passing over many states in which they do not land—and for planes engaged in trans-oceanic and foreign service.

The tax does not violate the commerce clause because it has long been held that a non-discriminatory tax upon the instruments of interstate commerce by a state having jurisdiction is permissible.

An alternative, sound in principle and tried and proven by long usage, is to be found in the cases holding ships, whether employed in foreign or interstate commerce,—on casual or regular scheduled service, in the coastwise trade or upon the inland waters, taxable only at the domicile of the owner because their stops at ports are temporary and without any purpose of abiding there. This rule could apply to all forms of interstate and foreign commercial aviation. The decision below was not founded upon those cases but might well have been.

I.

The Decision of the Court Below Is In Accord With and Is Sustained By the Decisions of This Court.

The basis of the court's decision as expressed by it, is as follows:

> "The power of this court over (petitioner) and the property taxed was present. (Petitioner) was incorporated here. Its principal place of business is located in this state, and all the planes at some time or another come within its borders. The benefits conferred upon (petitioner) by the government and laws of this state in relation to all (petitioner's) planes is equally clear. The policies and decisions made by (petitioner) in connection with the operation of its planes were made here and under the protection and benefits of the laws of this state. The manner and extent of their operation was determined and directed in this state. Particularly significant is the fact that when planes were in need of major repairs and overhauling the necessary repairing and overhauling were done here. These benefits did not cease the moment the planes

> crossed the border into another state. They continued and contributed to the successful operation of the planes throughout the course and scope of their operations.
>
> There is, therefore, no violation of due process in the taxation by this state of all the planes. There was a fair basis in the power of this state over (petitioner) and its planes and the benefits conferred with respect to this property upon which the tax may rest. We hold, therefore, that the tax herein questioned on all the planes was a valid one." (R. 28-29, ff. 46-47).

And the court might have added to the foregoing that the planes were flown to and from Minnesota enroute (R. 5-6, ff. 10-11); that St. Paul, Minnesota, was the home port for the entire fleet (R. 7-8, ff. 14-15); and 15 planes, practically, all of said fleet was in Minnesota on May 1, 1939, the assessment date (R. 8, f. 15). The decision is consistent with *State Tax Commission v. Aldrich,* 316 U. S. 174, 86 L. Ed. 1358; and *Curry v. McCanless,* 307 U. S. 357, 83 L. Ed. 1339. It was on this basis that the court declared that the tax did not offend the Fourteenth Amendment.

The petitioner contends that the Aldrich and McCanless cases are not applicable because involved therein was a tax upon intangibles. These cases did not turn upon the nature of the property involved, whether tangible or intangible, *but upon the relationship of the state to the person or property taxed; upon the benefits conferred and the protection afforded by the laws of the taxing state.* So in the instant case, protection and benefits of inestimable value flow from the State of Minnesota and its laws to the petitioner and the property taxed. Nor does the fact that other

states may have afforded protection to the same planes alter the case. Jurisdiction in Minnesota to tax need be founded only upon the protection and benefits afforded by its laws. Taxation by a non-domiciliary state, however, cannot be supported by a showing only of some protection to the property—but must also be supported by situs therein. *Frick v. Penn.*, 268 U. S. 473, 69 L. Ed. 1058, and *Delaware L. & W. R. R. Co. v. Penn.*, 198 U. S. 341, 49 L. Ed. 1077, have not been overruled nor are they inconsistent with the decision here for review. Both cases were concerned with tangible personal property *permanently* located outside the state of the owner's domicile. In the Frick case it was an art collection permanently located in a foreign state; in the Delaware case the property consisted of coal collected in piles and held in a foreign state for sale. The tax by the domiciliary state was held to violate the Fourteenth Amendment because the property was under the *exclusive* jurisdiction of another state and did not receive any protection or benefits from the laws of the domiciliary state. *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, is likewise distinguishable. There the entire fleet of refrigerated cars was sought to be taxed by Kentucky, the state of domicile. Although the evidence established that the headquarters for all of its cars was located at Milwaukee, Wisconsin, the Kentucky Court of Appeals sustained the tax on the fleet. The court declared the question before it to be (199 U. S. 201) "whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property *permanently* located in other states, and employed there in the prosecution of its business." The court further declared (p. 206)

that the property in question "is taxable in the state where it is *permanently* located and employed and where it receives its *entire* protection." (Italics supplied.) "The judgment of the court was that the taxation of such property so *permanently located* elsewhere by the law of the domicil of the owner would be a denial of due process of law and beyond the power of the state. * * * That judgment did not deny to the state of the domicil of the owner power to tax tangibles which had not acquired an actual situs elsewhere." *Southern Pacific Company v. Kentucky,* 222 U. S. 63, 74; 56 L. Ed. 96. It therefore follows that the decision in this case turned upon the proposition that Kentucky was without jurisdiction to tax because the property involved was permanently located in a foreign state. We submit that these cases are inapplicable because it clearly appears in the case at bar that the property involved was constantly receiving the protection of and valuable benefits from the laws of the State of Minnesota.

It has not been decided that the right of the domiciliary state to tax property located within its borders and which receives the benefit and protection of its laws—is affected by the right of non-domiciliary state to tax the same property.

All of the rolling stock cases with the exception of *Union Refrigerator Transit Co. v. Kentucky, supra,* and *N. Y. C. & H. R. R. v. Miller,* 202 U. S. 584,; 50 L. Ed. 1155, were non-domiciliary cases. In none of them were the rights of the domiciliary state determined. In Union Refrigerator Transit Co. v. Kentucky, it was decided only that when the property is permanently located beyond the state, it cannot be taxed by the domiciliary state. And in the later

case, *N. Y. C. & H. R. R. v. Miller, supra,* the court said concerning this question (p. 598): "Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home," indicating that the court then considered it an open question. The state's taxing power over a corporation of its own creation was confirmed in *Newark Fire Ins. Co. v. State Board of Tax Appeals,* 307 U. S. 313; 83 L. Ed. 1312.

In the absence of any decision concerning the right to tax airplanes engaged in interstate and foreign commerce, and particularly in the absence of any decision concerning the right of a non-domiciliary state to tax such planes, the petitioner seeks to restrict and limit the power of the domiciliary state before there has been a determination of principles defining the non-domiciliary state's power to tax. Whenever a domiciliary state was denied the right to tax tangibles, it was for the reason that such state was unable to afford the benefit and protection of its laws enabling the owner to enjoy the fruits of his ownership and for the further reason that it lacked the power to reach effectively the interests protected for the purpose of subjecting them to payment of the tax. *Curry v. McCanless, supra.* But in the instant case, none of these objections are present. The petitioner not only exists by virtue of the laws of Minnesota, but it uses its property therein under the protection of the laws of that state.

II.

The Petitioner Failed To Sustain Its Burden of Proving That Any Other State Had Jurisdiction To Tax Any of the Property Involved In This Proceedings.

Even if it be assumed for the sake of argument that the reasons given in support of the decision of the court below are wrong and if it be conceded that jurisdiction to tax in a foreign state correspondingly restricts the jurisdiction of the domiciliary state, yet, in order that the petitioner may escape the tax in question, it had the burden of proving that the property in question had acquired a situs for taxation in some other state. *State v. Backus-Brooks Co.*, 102 Minn. 50, 112 N. W. 863; *Appeal of Meyer*, 158 Minn. 433, 436, 197 N. W. 970; *Newark Fire Ins. Co. v. State Board of Tax Appeals, supra.* This, it has failed to do.

Tangible personal property is taxable at the domicile of the owner; (*Johnson Oil & Refining Company v. Oklahoma*, 290 U. S. 158, 78 L. Ed. 238; *Southern Pacific Company v. Kentucky*, 222 U. S. 63, 56 L. Ed. 96; *N. Y. C. & H. R. R. Co. v. Miller*, 202 U. S. 584, 50 L. Ed. 1155). If it is permanently located within the borders of another state, it acquires a situs for taxation there. *Old Dominion Steamship Company v. Virginia*, 198 U. S. 299, 49 L. Ed. 1059. In the instant case the property in question was not permanently located within the borders of any other state. It appears from the Stipulation and Findings of Fact that these planes were constantly in flight from state to state (R. 7, f. 14); (R. 12, f. 24), stopping only to take on or discharge passengers; and were in Minnesota enroute (R. 12-13, ff. 24-25), and for overhauling (R. 6, f. 11),

or for major repairs, this being the hom eport (R. 13, f. 25). Thus they were probably in Minnesota more frequently and for a greater period of time than elsewhere. None of the cases hold that the domiciliary state could not tax all the tangible personal property that had no situs elsewhere.

In order to oust Minnesota of jurisdiction to tax the Petitioner cited the rolling stock cases, so-called, and it was to these cases that the Court referred when it said, "Neither the stipulation nor the Findings of Fact are so clear as one could wish on whether such an average number of planes was so constantly and permanently in anyone state (other than state of domicile) as to acquire a situs there" (R. 23, f. 40). The rolling stock cases hold that when one permanently employs within the borders of a foreign state numerous items of tangible personal property, some or all of which are constantly changing, the average number permanently located therein may be subjected to taxation. But the average number over which the state acquires jurisdiction, *must be constantly and permanently and at all times present within the state.* Thus the rule as hereinbefore stated, was sufficiently relaxed to eliminate the necessity of each particular item of tangible personal property to be permanently located in a foreign state before that state could aequire jurisdiction. Jurisdiction attached to the average number constantly and permanently located with the borders of the state. *Pullman-Palace Car Co. vs. Penn.,* 141 U. S. 18, 35 L. Ed. 613; *American Refrigerator Transit Co. vs. Hall,* 174 U. S. 70, 43 L. Ed. 899; *Union Refrigerator Transit Co. vs. Lynch,* 177 U. S. 149, 44 L. Ed. 708; *Union Tank Line Co. vs. Wright,*

249 U. S. 275; *Johnson Oil Refining Co. vs. Oklahoma, supra.* In the *Pullman-Palace Car Co.* case, supra, it was found that there were an average of 100 cars *at all times within the state;* in *American Refrigerator Transit Co. vs. Hall, supra,* it was found there was an average of 40 cars; in the *Lynch case,* it was 10 cars; in the *Wright case,* it was 57 cars; and in the *Johnson Oil Refining case, supra,* it was found that the average number of cars was 64.

In essence the rule, as stated in the *Pullman Palace Car Co.* case, is (P. 26):

> "* * * particular cars may not remain within the state; *but the company has at all times substantially the same number of cars within the state,* and continuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state." (Italics supplied.)

The cases holding steamships engaged in interstate commerce taxable only at the owner's domicile were distinguished. They were said *not* to have a situs in other states (P. 23) "because they are not, in any proper sense, abiding within its limits, *and have no continuous presence* or actual situs within its jurisdiction and therefore can be taxed only at their legal situs, their home port and the domicile of their owners." (Italics supplied.) The distinguishing factor in the case of Pullman cars was *their continuous presence in the state.* It was on this point that the dissenting Justices disagreed with the majority. They declared that it was not a basis for jurisdiction to tax; that the case did not differ from the steamship cases.

There is no finding in the case at bar that there was an average number of these planes in any of the states in which the petitioner operates. How many of petitioner's planes were employed on the Minneapolis to Chicago run; how many on the Minneapolis to Winnipeg run; how many on the run from Minneapolis to Seattle and Portland does not appear. The only finding there is, is that these planes were constantly in flight from state to state, stopping only to discharge and take on passengers or for minor repairs (R. 12, f. 24). The route was through Minnesota, so that planes flew into and out of Minnesota and were here as much as they were in any other state, if not for even a greater length of time (R. 12, f. 24). When the planes were not in flight they returned to St. Paul, Minnesota, which is the home port of the planes; or were laid up there for major repairs which had to be done periodically (R. 11, f. 21; R. 13, f. 25). We submit that it is clear from these facts that there could be no finding that any of these planes were so permanently within the jurisdiction of any state other than the state of domicile so as to acquire a situs therein for taxation.

The petitioner contends that the Supreme Court of Minnesota found that some of the petitioner's planes acquired a situs in other states and to that extent were taxable in such states. But that contention is founded upon a misunderstanding of the Court's statement. The Court, after making the statement hereinbefore quoted, said, "But we shall not pursue the question, *for under the view we adopt it is not a material factor.* We concede * * * that the findings lead to the conclusion that some proportion of petitioner's planes acquired a situs in other states and to that extent may be taxed there" (R. 23, f. 40). (Italics sup-

plied.) It is clear from this statement that the court below, because of the conclusion which it had reached, decided that it was immaterial whether this property was taxable elsewhere or not, and therefore for the sake of the case and for the sake of argument made the concession mentioned. Since the Court was unable to discover from the findings that "such an average number of planes was so constantly and permanently in any one state as to acquire a situs there", it could have disposed of the case upon that ground alone, had it not determined to decide the case upon other grounds. In *N. Y. C. & H. R. R. Co. vs. Miller, supra,* in which the domiciliary state laid a tax upon all the cars of the railroad, a portion of which were alleged to have operated in other states, the court disposed of the case by saying (P. 598), "In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there." It is evident that such proof is lacking here and that the petitioner has failed to bring himself within the doctrine of the rolling stock cases and therefore the property in question was taxable in Minnesota.

III.

The Petitioner's Assumption That the Rolling Stock Cases Or Any Other Authority Supports Proportionate Taxation Is Erroneous.

It appears to be the contention of the Petitioner that when specific items of tangible personal property, instrumentalities of interstate commerce, are employed in several states that the right to tax extends only to a proportion

of any item or items so used. To put it another way it seems to be the claim of the petitioner that the several states must tax a proportion of these items based upon some formula such as route mileage or plane mileage as a basis for arriving at the proportion of the entire value of the fleet which each state may tax. In support of this new and radical theory the petitioner points to a general statement found in *Johnson Oil Refining Co. vs. Oklahoma, supra* (p. 162): "When a fleet of cars is habitually employed in several states—the individual cars constantly running in and out of each state—it cannot be said that any one of the states is entitled to tax the entire number of cars regardless of their use in other states. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this court has held that a state may fix the tax by reference to the average number of cars found to be habitually within its limits." The petitioner also cites as an illustration of the rule of apportionment which must be applied in such cases, the statement found in *Union Refrigerator Transit Co. vs. Kentucky, supra,* referring to the decision in *Pullman's Palace Car Co. vs. Penn., supra* (p. 206): "We have also held that, if a corporation be engaged in running railroad cars into, through, and out of a state, and having at all times a large number of cars within the state, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run."

It can be clearly demonstrated that the petitioner's conclusion is unfounded. The rule of the rolling stock cases is that when *at all times* a large number of cars or other items of rolling stock are found within a foreign state, jurisdiction to tax the average number present at all times results. When such items of tangible personal property are used and employed as part of an operating system and have an added intangible value as a result thereof, the state need not confine itself in evaluating the personal property to the mere worth of the article considered separately but may include as well the intangible value due to what has been called the organic relation of the property in the state to the whole system. *Union Tank Line Co. vs. Wright, supra* (p. 282 and 283).

In this case it appeared that the Tank Line Co. had employed during the year in question an average of 57 cars which had an actual value of $47,000. Georgia, using a mileage formula for the purpose of determining the intrinsic value of the cars obtained a value of approximately $290,000. The court held that the method employed for the purpose of determining the value of the property need not be exact but it must produce results approximately correct. It found that the value obtained was arbitrary and excessive and therefore it violated the 14th Amendment as well as the Commerce clause. *The Pullman Palace Car Co. case, supra,* had been cited in support of the formula adopted by Georgia. The court pointed out that in the Pullman case a similar formula was resorted to to obtain the value of 100 cars found to be employed at all times within the state of Pennsylvania, but the formula there used did not appear to have produced an excessive or arbitrary value. The com-

pany did not make an issue of the formula used. The court therefore concluded (pg. 284): "But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable, and productive of conclusive results, it must be regarded as obiter dictum, and we cannot now approve or follow it"; and further stated (pg. 286): "In such circumstances reasonableness of the rule was not really in question, and what was said of it cannot control here where the very point is presented for decision." It therefore follows that what was said by the court in *Union Refrigerator Transit Co. vs. Kentucky, supra,* concerning the *Pullman Palace Car Co. case, supra,* insofar as it sanctions proportional taxation, was wrong and was expressly ruled out in the Wright case. Nor is there anything in the *Johnson Oil Co. v. Oklahoma case, supra,* that sanctions proportional taxation. This is borne out by the fact that regardless of what the court may have said in preliminary general statements in the case, it determined only that since the average number of cars at all times in the State of Oklahoma during the tax period was 64, the state's jurisdiction to tax extended only to that number. The court did not concern itself with the extent of the jurisdiction of other states to tax, but merely with the extent of the jurisdiction of Oklahoma. In that case it appeared that an Illinois corporation having its principal offices in the City of Chicago, operated a refinery in Oklahoma and maintained in connection therewith a fleet of tank cars, 380 in number, which, except for rare instances, were employed in Oklahoma and other foreign states. The average number of

cars found to be constantly present in Oklahoma during the tax period was 64. It was held that that state could tax such a number of cars which on the average were found to be physically present within the state.

In the case at bar, the planes were assessed according to their value as separate items and not as part of an operating system (R. pp. 13-14, ff. 26-27).

It follows from the cases herein referred to that if rolling stock have been so employed in any state beyond the domiciliary state so that an average number of them have acquired a situs for taxation therein that state may tax such stock *according to their full value including their intrinsic worth as part of an operating system* regardless of what the rights of other states along the route may be. There is no basis for contending that one state must share proportionately with other states along the route its right to tax appellant's planes if such right exists at all. If the petitioner's contention were sound, the extent to which one state could tax would depend entirely upon the length *of the petitioner's route. If it operated* in only two states it would appear that the right of each state would be much greater than if its route extended through 4 or 5 or more states, the number of planes being the same. Under the rule as announced by the cases cited, the right of each state to tax must turn upon the facts as they exist in each state. The right of each state to tax must turn upon the average number of items of personal property constantly employed in that state. The claim that the state must apportion is as we have seen without foundation.

IV.

The Rolling Stock Cases Are Inapplicable In the Taxation of Airplanes Engaged In Interstate and Foreign Commerce.

Aviation, like the railroad, has revolutionized travel. As the rules relating to the taxation of personal property were impractical in their application to the taxation of railroad rolling stock, so the rules applying to the taxation of rolling stock are impractical in their application to the taxation of airplanes. The extension of the railroad into interstate commerce by the absorption of and combination with other roads, brought into foreign states large amounts of rolling stock some or all of the items of which were constantly changing. Nevertheless there was at all times within such foreign states an average number of such items of rolling stock: It was at once evident that the application of the rules applying to the taxation of other tangible personal property would be impracticable and difficult to apply to rolling stock. Each item of personal property would be taxable or not depending upon the facts concerning that particular item; the difficulties that would result are apparent. The rule therefore was modified to give each state jurisdiction over the average number of items of rolling stock constantly within its borders. *Pullman Palace Car Co. v. Pennsylvania, supra.* The rule there announced has remained unchanged, down to *Johnson Oil Co. vs. Oklahoma, supra.*

The airplane has not only revolutionized travel but has changed our thinking about travel. Now we think of distance in terms of hours and minutes instead of miles. We

no longer think of Los Angeles as being so many hundreds of miles from New York—but as 12 hours distant; nor of London as over 3,000 miles from Washington—but as 15 hours distant. It was stated in the minority opinion of the court below (R. 32, f. 51): "Airplanes span the continent in a few hours, passing over many jurisdictions in the course of a day's flight." Hence the speed of the plane is such, that relatively few planes are necessary to operate regular scheduled service on an established route over many states each day. In 1939 there were only 265 transport planes in service and reserve by all domestic air carriers of the United States and 74 planes on foreign and territorial routes. *Civil Aeronautics Journal* (issued by Civil Aeronautics Authority) Vol. 1, No. 20, October 15, 1940, page 454.

Since a single plane is able to travel the entire route over many states each day, the rule applicable to rolling stock, is inapplicable to aviation. The flight of a plane into a foreign state stopping there solely for the purpose of taking on or discharging passengers or cargo or for minor repairs, does not give it a situs for taxation in that state or the same plane may be taxed in many states. Then there is the problem involving the states over which a plane may pass, as is its federal right to do, without stopping therein at all, as is the case here insofar as Idaho is concerned; and likewise insofar as Wisconsin is concerned—the petitioner conducts through flights from Minneapolis, Minnesota, to Chicago, Illinois (R. 10-11, ff. 20-21). Even if as many as 5 planes were to pass over each of the eight states on petitioner's route daily, for the greater part of each day none will be present in such states. How then will the average number of planes in each state be determined?

The fact is that none will be constantly present in any state. It has been herein shown that each state may tax the entire value of such items of personal property having a situs therein; that there is no basis for requiring any state to share or to apportion the tax upon such items of personal property with other states. This illustrates how different is the problem of the taxation of airplanes from that of the taxation of rolling stock of railroads. The thousands upon thousands of slow moving cars, freights, locals, nearly all engaged in intrastate as well as interstate commerce, do not present a difficult problem for taxation under the rule of the rolling stock cases. But it seems to us clear that such a rule cannot be practically applied to aviation. If it were applied to planes operating from state to state in interstate commerce, then how could it be applied to planes operating on non-stop cross-country flights, such as for example a non-stop flight from New York to Chicago, or from New York to Los Angeles. The right to use the air of intervening states in which the plane does not stop was granted by Congress. Upon what basis could such intervening states acquire jurisdiction to tax? There are no benefits or protection that flow from the laws of such states to the owner in the use and enjoyment of his property. Nor can such property be reached by such states for the enforcement of the tax. In the rolling stock cases the basis of jurisdiction *is the permanent and constant presence within the state of the average number of items.* Is the mere fleeting use of the air sufficient to give such state jurisdiction? If so, then each such state may tax the same plane on its full value, which is not the goal sought by the petitioner. Upon

what basis could American planes operating in trans-oceanic and foreign service be taxed? Surely these must be taxed either by the domiciliary state, or where the principal office, from which operations are directed, is located, if the owner be domiciled elsewhere. In the instant case both are in Minnesota (R. 10, f. 20). It would appear that if the rule of the rolling stock cases is to be applied to airplanes operating in interstate commerce from state to state, then a second rule must be adopted for non-stop flights and a third rule for planes operating in trans-oceanic or foreign service. Complications arise when the same planes are used both in domestic and foreign service. In the instant case, petitioner's planes fly to Winnipeg, Canada. Minnesota's right to tax them cannot be denied.

V.

The Tax Upon Petitioner's Fleet of Planes By the Domiciliary State Is Supported By the Decisions of This Court and It Is In the Best Interests of the Aviation Industry that Such Taxes Be Sustained.

It has long been the established rule of this court that instrumentalities of inter-state and foreign commerce that are brought into other states temporarily for the purpose of taking on or discharging passengers or cargo whether the stops in such states be regular scheduled stops or casual, such instrumentalities are taxable only at the domicile of the owner. The reason for the rule is that such instrumentalities are brought to such foreign states for temporary purposes, for purposes incidental to the journey, and without any intention that they should permanently

abide therein. *N. Y. C. & H. R. R. Co. v. Miller, supra; State v. Union Tank Line Company*, 94 Minn. 320, 102 N. W. 721. The doctrine is equally applicable to such instrumentalities whether engaged in foreign commerce or among the several states. *Hays v. Pacific Mail S. S. Co.*, 58 U. S. (17 How.) 596, 15 L. Ed. 254; *Morgan v. Parham*, 83 U. S. (16 Wall.) 471, 21 L. Ed. 303; *St. Louis v. Wiggins Ferry*, 78 U. S. (11 Wall.), 423, 20 L. Ed. 192; *Ayer & Lord Tie Company v. Kentucky*, 202 U. S. 409, 50 L. Ed. 1082; *Southern Pacific Company v. Kentucky, supra.* While this is not the ground upon which the court below based its decision it could well have been founded upon these cases and is adequately supported by them.

While these cases deal with the taxation of ships, they merely give expression to the well established rule governing the taxation of personal property. In *Hays v. Pacific Co., supra,* the ships operated on regular scheduled service between New York and San Francisco, via Panama. In *St. Louis v. Wiggins Ferry, supra,* a regular scheduled ferry service from the Illinois shore across the Mississippi to St. Louis, Missouri, was involved. In *Morgan v. Parham, supra,* it was a daily and tri-weekly steamship service between Mobile, Alabama, and New Orleans. In *Ayer & Lord Tie Company v. Kentucky, supra,* there was involved a group of boats engaged in transporting rail ties from points on the Ohio, Tennessee and Mississippi rivers to certain cities along those rivers. In *Southern Pacific Company v. Kentucky, supra,* there was a fleet of steamships making regular scheduled runs between New York and New Orleans; also between New York, New Orleans and Havana, Cuba. Whether the stops at ports of foreign

states along the route were regular scheduled or casual stops was not considered a distinguishing factor. In either case they were considered temporary, and that the ships did not become incorporated into the general mass of property; and the journey was such as to wholly exclude the idea of permanently abiding in such states. Thus they did not acquire a situs within such states; the situs remained at the domicile of the owner. However, when a ship was permanently employed in the waters of a state, not the owner's domicile, it acquired a situs for taxation there. *Old Dominion S. S. Co. v. Virginia, supra.* Petitioner asks that if the ships in this case were employed in the waters of Virginia and North Carolina "could there, under this decision, be any escape from the necessity of an apportionment between these two states?" (Petitioner's brief, p. 27.) Apparently, he has overlooked *St. Louis vs. Wiggins Ferry, supra,* in which the ferry was employed in the waters of two states—and several other cases—and there was escape from the necessity of apportionment. The boats were taxed at the owner's domicile.

To distinguish these cases, the petitioner has made an effort to establish a similarity between airplanes and railroads in support of his claim that rolling stock cases should apply. It is claimed that the fixed route of a railroad and that of petitioner may be considered the same. The fact is that the only similarity is that both have a starting and terminating point. But the route of a plane is twenty to fifty miles in width and is at an altitude of 1,000 to 15,000 feet. The plane may fly anywhere in this area, subject to certain restrictions. A plane proceeding in one direction must fly at even numbered thousands of feet, such as 2,000, 4,000, 6,000 feet, etc.; while those proceeding in the op-

posite direction fly at odd numbered thousands feet, such as 1,000, 3,000, 5,000 feet, etc.; the result is that it can be said that in all probability no two planes ever fly the identical route; and that each route really consists of fifteen routes or route levels, twenty to fifty miles in width. ("Civil Air Regulations" Part 60, 60.580-60.581; Part 61, 61.731, 61.742 U. S. Civil Aeronautics Authority). The air routes more closely resemble the ship lane of the Great Lakes and the oceans. Nor does the fact that the Civil Aeronautics authority marks out the route by radio beam add anything. We have seen that the beam acts merely as a guide. The pilot is not required to follow it. He is allowed a leaway of twenty to twenty-five miles either side of it. But is the beam any different in principle than the lighthouses, markers and buoys maintained by the Federal government for years along the seacoasts, lakes and rivers?

In *Pullman Palace Car Co. v. Penn., supra* (P. 23-24), the distinction between ships and railroad cars was recognized and what was there said concerning ships applies equally to airships:

> "Between ships * * * having their situs fixed * * * and touching land only incidentally and temporarily; and cars * * * traversing the land only, the distinction is obvious. * * * 'Maritime transportation requires no artificial roadway. * * * The navigable waters of the earth are recognized public highways of trade and intercourse'."

As the ship touches land only at a port, so the plane drops down out of the sky. A plane "requires no artificial roadway" and "is not intended to stay in port but to navigate" the air. The air-space of the world is recognized as providing public highways of trade and commerce.

That the petitioner maintains ticket offices, hangars, places for minor repairs, baggage handlers, etc., at various points along its route has no material bearing upon this controversy. All of these facilities are also maintained by ship operators, in addition to warehouses, ferry boats, tugs, barges and similar auxiliary ships. But these are mere incidents to the business of airplane or steamship owners. These things which are permanently fixed in any state are taxable there, even though the owner's domicile be elsewhere. *Old Dominion S. S. Co. v. Virginia, supra; Southern Pacific Co. v. Kentucky, supra; Hayes v. Pacific Mail S. S. Co., supra.*

When the operation of airplane and steamship service are compared, their similarity can be readily seen. Compare petitioner's field of operations in the air in the northwest with that of a steamship company upon the Great Lakes. The medium used in the one is the air. In the other, it is the water. Airships of the petitioner fly the one on regular courses on regular schedules through the territorial skies of the several states. Steamships ply the other on regular courses on regular schedules through the territorial waters of the several states. The airplane course is marked by Federally maintained beacons. The ship's course is marked by Federally maintained buoys, markers and lighthouses. Airships put down to land from time to time at airports, perhaps at Duluth, to take on and discharge passengers and freight at port facilities specially prepared for them. Steamships put into land from time to time at seaports, perhaps at Duluth, to take on and discharge passengers and freight at port facilities specially prepared for them. The petitioner's airships are continuously engaged in flying from state to state. The steam-

ships are continuously engaged in plying the water from state to state. Every reason for the adoption of the vessel rule is a reason for adopting the same rule for airplanes. To sustain the vessel rule compels the application of the same rule to airplanes. We are convinced that the court cannot sustain the contention of the petitioner without overruling the line of steamship cases.

If the doctrine of these cases were applied to petitioner's planes, it would avoid the necessity of having one rule for planes engaged in interstate commerce flying from state to state; another for planes flying on non-stop flights over intervening states in which they do not stop; and still a third for American planes engaged in foreign commerce. So far as aviation is concerned, it would require each company and the petitioner to deal with only one assessor and with one state, the state of domicile. It would avoid the complications arising from the different formulas that each state might adopt. It would avoid the difficulty of determining the number of planes that each state might tax. In short it may be truly said that it is the only rule under which we can be assured that multiple taxation may be avoided. The rule has been tried and proven for a great many years and has been found satisfactory. Insofar as the aviation industry is concerned, it would be in its best interests is such a rule were adopted.

VI.

Tax Payments Elsewhere Were Voluntary.

The petitioner claims to have paid taxes in some of the states in which it operates upon the property in question (R. 9, f. 17). It does not claim that such taxes were demanded or that the *right* to demand them has been established. Nor does it appear to what extent or on what basis taxes were paid. *It is not claimed that taxes were paid in Idaho over which it flies but in which it does not land; or in Canada.* The payment of such taxes was a voluntary act and therefore is wholly immaterial in considering the petitioner's liability for taxes. The right of the state of domicile to tax does not rest upon the fact that a tax was or was not paid elsewhere; but upon the *right* of another state to tax because a situs was there acquired. Thus, if no taxes were paid elsewhere, the problem would be unchanged. *Sancho v. Humacao Shipping Corp.*, 108 F. 2nd 157, 160. Besides, if the right to tax elsewhere had been established, it has not yet been determined that under the circumstances of this case, Minnesota would lose jurisdiction to tax. *N. Y. C. & H. R. R. Co. v. Miller, supra.*

VII.

The Tax Does Not Violate the Commerce Clause.

Involved here is a property tax on instrumentalities engaged largely in interstate and foreign commerce laid by the domiciliary state having jurisdiction. The tax is not claimed to be excessive. It is one that is laid on all prop-

erty alike and is not aimed at instrumentalities of interstate and foreign commerce. It was found by the court below (R. 30, f. 48) to be non-discriminatory. The right to lay such a tax has long been recognized. *Marye v. B. & O. R. R. Co.*, 127 U. S. 117, 124, 32 L. Ed. 94, 96; *Pullman Palace Car Company v. Pennsylvania, supra.* The petitioner is not justified in criticizing the court below for the brevity of its holding on this point, because it was not argued or stressed and further because there is not much more that can be said. The petitioner cites no authority in point. The gross income cases (*Adams Mfg. Co. v. Storen*, 304 U. S. 307 and *Gwin White and Prince, Inc. v. Henneford*, 305 U. S. 434) are not in point because they are attempts to tax activities occurring beyond the state. In *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, a tax upon a local activity was sustained. Involved in the case at bar is an ad valorem tax on property within Minnesota's jurisdiction.

There is no basis in this case to support the claim that any other state had the right to tax these planes, since the petitioner failed in sustaining this burden. *General American Tank Car Corp. v. Day*, 270 U. S. 367; 70 L. Ed. 635. Furthermore, it has not been held that jurisdiction to tax some of these planes elsewhere correspondingly reduces Minnesota's jurisdiction. *N. Y. C. & H. R. R. v. Miller, supra.* If the steamship cases are followed, this question does not arise. It has recently been held that double taxation is not constitutionally objectionable. *Illinois Central R. Co. v. Minnesota*, 309 U. S. 157; 84 L. Ed. 670.

CONCLUSION.

In conclusion we urge that the decision of the Court below be sustained (1) because it is in accord with the decisions of this Court, (2) because the petitioner has failed to sustain the burden of establishing the invalidity of the tax and (3) because it would be in the interests of the aviation industry if it had but one tax to pay and one state to deal with.

Aviation has revolutoinized communications between the states of this nation as well as the nations of the world to a much greater extent than did the railroad or the steamship. The Court judicially knows that we have established routes to many parts of the world. Distances that heretofore required weeks of travel are now reached by air in a matter of hours. "Air Transport" by J. Parker Van Zandt (Reprint of Part 2, Sec. 1 of "Transportation and National Policy" issued by National Resources Planning Board), p. 329, 333. "Post War Transport Aircraft" by Edward Warner, Vice-Chairman of Civil Aeronautics Board, p. 3, 18-20 inclusive. "American Air Transport", by Office of War Information, June, 1943, p. 11, 20. As World War I demonstrated the feasibility of commercial aviation, so this War will produce an expansion of the industry heretofore undreamed of. In determining the question here presented, all forms of domestic commercial aviation, including non-stop flights from one end of the nation to the other, as well as trans-oceanic and foreign commercial aviation should be considered. It has been shown that due to the tremendous speed of planes the vast domestic and foreign system require but a compara-

tively few planes; that it is impractical to apply to the taxation of them the rule of the rolling stock cases; that it would be well if a single rule were made applicable to all forms of commercial aviation; and it is suggested that taxation at the owner's domicile, exclusively, would be a sound and practical rule for all; especially where it is the domicile in fact as well as in law and where the principal office is located.

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October, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 33.—October Term, 1943.

Northwest Airlines, Inc., Petitioner, vs. State of Minnesota. } On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[May 15, 1944.]

Mr. Justice Frankfurter announced the conclusion and judgment of the Court.

The question before us is whether the Commerce Clause or the Due Process Clause of the Fourteenth Amendment bars the State of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn.

Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintenance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. Details as to stopovers, other runs, the location of flying crew bases and of the usual facilities for aircraft, have no bearing on our problem.

The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from State to State, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax (Minn. Stat. 1941, § 273.01), Northwest's scheduled route mileage in Minnesota

was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. The Supreme Court of Minnesota, with three judges dissenting, affirmed the judgment of a lower court in favor of the State. 213 Minn. 395. A new phase of an old problem led us to bring the case here. 319 U. S. 734.

The tax here assessed by Minnesota is a tax assessed upon "all personal property of persons residing therein, including the property of corporations . . .". Minn. Stat. 1941, § 272.01. It is not a charge laid for engaging in interstate commerce or upon airlines specifically; it is not aimed by indirection against interstate commerce or measured by such commerce. Nor is the tax assessed against planes which were "continuously without the State during the whole tax year", *N. Y. Central Railroad* v. *Miller*, 202 U. S. 584, 594, and had thereby acquired "a permanent location elsewhere", *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 68; and see *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, 328-330.

Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the "home port" of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator

and creature and the practical consequences of that relation in this case. On the basis of rights which ~~only~~ Minnesota originated alone and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State. It is too late to suggest that this taxing power of a State is less because the tax may be reflected in the cost of transportation. See *The Delaware Railroad Tax*, 18 Wall. 206, 232.

Such being the case, it is clearly ruled by *N. Y. Central Railroad* v. *Miller, supra.* Here, as in that case, a corporation is taxed for all its property within the State during the tax year none of which was "continuously without the State during the whole tax year". Therefore the doctrine of *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, does not come into play. The fact that Northwest paid personal property taxes for the year 1939 upon "some proportion of its full value" of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us. It was not shown in the *Miller* case and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, *i. e.*, a taxing situs, elsewhere.[1] That was the decisive feature of the *Miller* case, and it was deemed decisive as late as 1933 in *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158, which was strongly pressed upon us by Northwest. In that case it was not the home State, Illinois, but a foreign State, Oklahoma, which was seeking to tax a whole fleet of tank cars used by the oil company. That case fell outside of the decision of the *Miller* case and ours precisely falls within it. "Appellant had its

[1] In the *Miller* case, the New York Central Railroad introduced evidence that during the taxable years in question, a proportion of its cars, ranging from about 12% to 64%, was used outside of New York. This figure was arrived at by using the ratio between Central's mileage outside of New York and its total mileage. The comptroller nevertheless ruled that all of Central's cars were taxable in New York, the State of domicile. On review of this ruling as applied in the first tax year involved, the New York Court of Appeals remitted the proceedings to the comptroller to determine whether any of the rolling stock was used exclusively out of the State. 173 N. Y. 255. No such evidence was introduced for any tax year, although there was evidence to show "that a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year." 202 U. S. 584, 594. The comptroller made no reduction in the tax, and this action was affirmed by the Appellate Division (89 App. Div. 127), the Court of Appeals (177 N. Y. 584) and on review here.

domicile in Illinois," as Mr. Chief Justice Hughes pointed out, "and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere." 290 U. S. at 161.[2] This constitutional basis for what Minnesota did, reflects practicalities in the relations between the States and air transportation. "It has been customary to tax operating airplanes at their overhaul base." Thompson, *State and Local Taxation Affecting Air Transportation* (1933) 4 J. Air L. 479, 483.

The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier "engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run." *Union Transit Co.* v. *Kentucky, supra* at 206. This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. Thus, for instance, "The coaches of the company . . . are daily passing from one end of the State to the other", in *Pullman's Car Co.* v. *Pennsylvania, supra* at 20, citing the opinion of the court below in 107 Pa. 156, 160.) The continuous protection by a State other than

[2] In the *Johnson Oil Co* case, *supra,* this Court reaffirmed not less than three times that the State of domicile has jurisdiction to tax the personal property of its corporation unless such property has acquired an "actual situs" in another State. And by "actual situs" it meant, as its references to Union Transit Co. *v.* Kentucky, *supra,* and the *Miller* case indicate, what those cases required for "actual situs" before the constitutional power of the domiciliary State to tax could be curtailed, namely continuous presence in another State which thereby supplants the home State and acquires the taxing power over personalty that has become a permanent part of the foreign State. Surely the situs which personal property may acquire for tax purposes in a State other than that of the owner's domicile cannot be made to depend on some undefined concept of "permanence" short of a tax year, leaving the adequate size of the fraction of the tax year for judicial determination in each year. Such a doctrine would play havoc with the tax laws of the forty-eight states. It would multiply manifold the recognized difficulties of ascertaining the domicile of individuals. See Texas *v.* Florida, 306 U. S. 398; Dist. of Columbia *v.* Murphy, 314 U. S. 441.

the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.

The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. For reasons within its own sphere of choice Congress at one time [redacted] chartered interstate carriers and at other times has left the chartering and all that goes with it to the States. That is a practical fact of legislative choice and a practical fact from which legal significance has always followed. That far-reaching fact was recognized, as a matter of course, [redacted] by Mr. Justice Bradley in his dissent in the *Pullman's Car Co.* case, *supra* at 32. Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State.[3] And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.

Such was the unanimous decision in the *Miller* case or the *Miller* case decided nothing. The present case is precisely the case which Mr. Justice Holmes assumed the *Miller* case to be. By substituting Minnesota for New York we have inescapably the facts of the present case: "Suppose, then, that the State of Minnesota had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. . . . But it has not been decided, and it could

[3] In the most recent apportionment case to come before this Court, Nashville, C. & St. L. Ry. *v.* Browning, 310 U. S. 362, we merely sustained the application by the Tennessee Railroad Commission and the Tennessee Supreme Court of a "familiar and frequently sanctioned formula" for apportionment on a mileage basis against the claim of the inapplicability of this formula in the circumstances of that case because of the disparity in the revenue-producing capacity between the lines in and out of Tennessee. Mathematical exactitude in making the apportionment has never been a constitutional requirement. That is the essence of the *Browning* holding. No suggestion can be found at any stage of that litigation in any wise touching the present problem, namely, whether the domiciliary State is constitutionally limited in taxing all the movables that come within it except by the *Union Transit* doctrine, that a proportion which had during the entire tax year been within another State cannot be taxed in the domiciliary State.

not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *N. Y. Central Railroad* v. *Miller, supra* at 596-597.[4] Surely, the power of the State of origin to "tax its own corporations for all their property within the State during the tax year" cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as the property is not "continuously without the State during the whole tax year", *N. Y. Central Railroad* v. *Miller, supra* at 594, even when, as in the *Miller* case, from 12% to 64% of the property was shown to have been used outside of New York during the tax year, but in no one visited State permanently, that is, for the whole year. And that is the decisive constitutional fact about the *Miller* case—that although from 12% to 64% of the rolling stock of the railroad was outside of New York throughout the tax year, New York was nevertheless allowed to tax it all because no part was in any other State throughout the year.

To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States. The doctrine of tax apportionment has been painfully evolved in working out the financial relations between the States and interstate transportation and communication conducted on land and thereby forming a part of the organic life of these States. Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce.[5] To what extent it should be carried over to the

[4] In speaking of "occasional excursions to foreign parts" and "random excursions" (202 U. S. at 597), Mr. Justice Holmes merely put colloquially the legally significant fact that neither any specific cars nor any average of cars was so continuously in any other State as to have been withdrawn from the home State and to have established for tax purposes an adopted home State.

[5] And that the constitutional power of the domiciliary State to tax vessels is precisely the same as its power to tax rolling stock is conclusively shown by the Court's reliance in the *Miller* case on a case decided a week before, namely Ayer & Lord Co. v. Kentucky, 202 U. S. 409.

totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship.

The doctrine in the *Miller* case, which we here apply, does not subject property permanently located outside of the domiciliary State to double taxation. But not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere. And what the *Miller* case decided is that neither the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity.

Each new means of interstate transportation and communication has engendered controversy regarding the taxing powers of the States *inter se* and as between the States and the Federal Government. Such controversies and some conflict and confusion are inevitable under a federal system. They have long been the source of difficulty and dissatisfaction for us, See J. B. Moore, *Taxation of Movables and the Fourteenth Amendment* (1907) 7 Col. L. Rev. 309; Groves, *Intergovernmental Fiscal Relations,* Proceedings Thirty-fifth Annual Conference, National Tax Association, p. 105, and have equally plagued the British federal systems, see Report of the [Australian] Royal Commission on the Constitution, (1929) c. XII (p. 127), c. XIX (p. 187), c. XXIII (at p. 259); Report of the [Canadian] Royal Commission on Dominion-Provincial Relations, (1940) Bk. I, c. VIII, Bk. II, § B, c. III. In response to arguments addressed also to us about the dangers of harassing state taxation affecting national transportation, the concurring judge below adverts to the power of Congress to incorporate airlines and to control their taxation. But insofar as these are matters that go beyond the constitutional issues which dispose of this case, they are not our concern.

Affirmed.

Mr. Justice BLACK, concurring.

I concur in the judgment of the Court and in substantially all that is said in the opinion, but I would not in this case foreclose consideration of the taxing rights of States other than Minnesota.

I believe there is small support in reason or in the Constitution for the doctrine that the Commerce Clause in and of itself prohibits a state from applying its general tax laws to transactions and properties in interstate commerce unless it is able to make two correct prophecies as to what this Court ultimately may hold, namely, [1] The permissible total of taxes which might be imposed by an aggregate of states on the taxed properties or transactions; and [2] The proportion of this total which the state itself fairly may claim. See dissenting opinions in *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, 316; *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 442. Extension of this dubious doctrine to the new problems of air transport gives promise of little but tax confusion.

The differing views of members of the Court in this and related cases illustrate the difficulties inherent in the judicial formulation of general rules to meet the national problems arising from state taxation which bears in incidence upon interstate commerce. These problems, it seems to me, call for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution: See dissenting opinion, *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, 183.

Mr. Justice JACKSON, concurring.

This case considers for the first time constitutional limitations upon state power to tax airplanes. Several principles of limitation have been judicially evolved in reference to ships and to railroad rolling stock. The question is which, if any, of these should be transferred to air transport.

We are at a stage in development of air commerce roughly comparable to that of steamship navigation in 1824 when *Gibbons* v. *Ogden*, 9 Wheat. 1, came before this Court. Any authorization of local burdens on our national air commerce will lead to their multiplication in this country. Moreover, such an example is not likely to be neglected by other revenue-needy nations as international air transport expands.

Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified. Today the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be "owned" to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat 1, to *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether. Our function is to determine what rule governs in the absence of such legislative enactment.

Certainly today flight over a state either casually or on regular routes and schedules confers no jurisdiction to tax. Earlier ideas of a state's sovereignty over the air above it might argue for such

a right to tax, but it is one of those cases where legal philosophy has to take account of the fact that the world does move.

Does the act of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax. *Hays* v. *Pacific Mail S.S. Co.*, 17 How. 596; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; cf. *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409. I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again.

What, then, remains as a basis for Minnesota's claim to tax this entire fleet of planes at their full value as property of the State of Minnesota? They have been within the state only transiently and in the same manner in which they have been in many states: to serve the public and to be serviced. The planes have received no "protection" or "benefit" from Minnesota that they have not received from many others. It might be difficult, in view of the complete control of this type of activity by the Federal Government, to find what benefits or protection any state extends. But no distinction whatever can be pointed out between those extended by Minnesota and those extended by any state where there is a terminal or a stopping place.

But it is said that Minnesota incorporated the company. Of course it is her right to tax the company she has created and the franchise she has granted. I suppose there are many ways that she might constitutionally measure the value of this privilege. If she chartered a corporation on condition that all property it might acquire, tangible or intangible, should be taxable under her laws, I do not think a company which accepted such a charter could appeal to the Constitution to give back what it voluntarily contracted away. But no such stipulation has been made in the charter in this case. The tax imposed here is a general *ad valorem* prop-

erty tax on the full value of every plane of the fleet operated by this company. Domicile of an owner is a usual test of power to tax intangibles, but has not generally been a conclusive test of taxability of tangible property situated elsewhere. If we should suppose that this corporation had a Delaware charter instead of a Minnesota one, and had nothing in Delaware except its agent, but operated otherwise in Minnesota exactly as it has done, would we say that the entire right to tax the fleet moved to Delaware because it was the corporation's state of domicile? I do not think that domicile, in the facts of this case, is decisive of Minnesota's claim to tax the tangible property of the company wherever situate.

It is strongly and plausibly advocated that the theory of apportionment of the total value among the several states of operation, heretofore applied to state taxation of railroad rolling stock, be transferred to air transportation. This would mean that each state of operation (no one ventures to say whether flight alone or both flight and landing would be required) could tax a proportion of the total value.

The apportionment theory is a mongrel one, a cross between desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce. It is a practical, but rather illogical, device to prevent duplication of tax burdens on ve in transit. It is established in our decisions and has been found more or less workable with more or less arbitrary formulae of apportionment. Nothing either in theory or in practice commends it for transfer to air commerce. A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has acquired from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes.

It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help. The best analogy that I find in existing decisions is the "home port" theory applied to ships. See *Hays* v. *Pacific Mail S.S. Co.*, *St. Louis* v. *Ferry Co.*, *Morgan* v. *Parham*, *supra*. There is difficulty in the application of this doctrine to air commerce, I grant. There is no statutory

machinery for fixing the home port. If federal registration established statehood as it establishes nationality, the home port doctrine would be easy to apply. However, on the record before us it seems unquestioned that Minnesota is in an operational as well as in a domiciliary sense the home port of this fleet. On that doctrine Minnesota can tax the fleet, but its right to do so is exclusive, for no other state can acquire jurisdiction to tax merely because it provides a port of call. I therefore concur in the conclusion reached by the opinion of Mr. Justice FRANKFURTER. I do not accept the opinion because it falls short of commitment that Minnesota's right is exclusive of any similar right elsewhere. It is, I know, difficult to judge and dangerous to foreclose claims of other states that are not before us. That is the weakness of the judicial process in these tax questions where the total problem that faces an industry reaches us only in installments. If the reasoning should hereafter be extended to support full taxation everywhere, it would offend the commerce clause, as I see it, even more seriously than apportioned taxation everywhere.

The evils of local taxation of goods or vehicles in transit are not measured by the exaction of one locality alone, but by the aggregation of them. I certainly do not favor exemption of interstate commerce from its "just share of taxation." But history shows that fair judgment as to what exactions are just to the passerby cannot be left to local opinion. When local authority is taxing its own, the taxed ones may be assumed to be able to protect themselves at the polls. No such sanction enforces fair dealing to the transient. In all ages and climes those who are settled in strategic localities have made the moving world pay dearly. This the commerce clause was designed to end in the United States.

The rule I suggest seems most consonant with the purposes of the commerce clause among those found in our precedents. But the whole problem we deal with is unprecedented. I do not think we can derive from decisional law a satisfactory adjustment of the conflicting needs of the nation for free air commerce and the natural desire of localities to have revenue from the business that goes on about them.

I concur in the affirmance of the judgment below, but only because the record seems to me to establish Minnesota as a "home port" within the meaning of the old and somewhat neglected but to me wise authorities cited.

Mr. Chief Justice STONE, dissenting.

In my opinion the Minnesota levy imposed an unconstitutional tax on petitioner's vehicles of interstate transportation in violation of the commerce clause, and for that reason the judgment below should be reversed.

Petitioner, a Minnesota corporation, is owner of a large number of airplanes which it uses exclusively in interstate transportation moving on regular schedules and over fixed routes extending through eight states between Chicago, Illinois and the Pacific coast, with the usual landing fields and maintenance bases at intermediate points, including Minneapolis and St. Paul, Minnesota. It is stipulated that on May 1, 1939, 14% of the total mileage of the prescribed interstate routes was in Minnesota and that 16% of the daily plane mileage of all petitioner's interstate planes was in that state.

Although the Minnesota statute taxing personal property directs that it shall be listed for taxation on May 1st of each year and assessed for taxation at its value on that date, Minn. Stat. 1941 § 273.01, the state taxing authorities have levied on petitioner, and the Minnesota Supreme Court and this Court have sustained, an annual tax on the full value of all its planes used in interstate commerce which have come into the state at any time during the year. It is evident that if, with the Minnesota tax now sustained, other states are left free to impose a further or comparable tax on the same property for the same tax period, a serious question is raised whether the tax is not a prohibited burden on interstate commerce.

It is no longer doubted that interstate business "must pay its way" by sustaining its fair share of the property tax burden which the states in which the interstate business is done may lawfully impose generally on property located within them. See *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254-5 and cases cited. Obviously interstate business bears no undue part of that burden if the personal property tax imposed on it by a given state is—like a tax on real estate located there—exclusive of all other property taxes imposed by other states, as is the case with the taxation of vessels, *Old Dominion S.S. Co.* v. *Virginia*, 198 U. S. 299; *Southern Pacific Ry.* v. *Kentucky*, 222 U. S. 63 and cases cited; cf. *New York Central R. R. Co.* v. *Miller*, 202 U. S. 584, or if

the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state, as has until now been the rule as to railroad cars. *Marye* v. *Baltimore & Ohio R. R.*, 127 U. S. 117, 123-4; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Germania Refining Co.* v. *Fuller*, 245 U. S. 632; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275; *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158.

If the tax levied here were held to be exclusive of all property taxes imposed on petitioner's airplanes by other states there could be no serious question of an undue burden on interstate commerce. That question arises now only because the rationale found necessary to support the present tax leaves other states free to impose comparable taxes on the same property used in interstate commerce which Minnesota has already taxed for the entire taxable year and at its full value.

Such, I think, is the necessary consequence of the Court's decision and ~~opinion~~ now given. They do not sustain the tax on the ground that Minnesota, as the state of petitioner's domicile, has exclusive power to tax respondent's planes which pass in and out of Minnesota in performance of their interstate functions. They do not deny that the planes are constitutionally subject, to some extent, to personal property taxes by the states through which they pass. Our decisions, as will presently appear, establish that they are, and that vehicles of interstate transportation moving from the state of the owner's domicile over regular routes within the jurisdiction of other states also acquire a tax situs there, so that, to an extent presently to be considered, they may be taxed by each of the states through which they pass. In fact the record discloses that petitioner's interstate planes, already taxed by Minnesota for their full value, are in addition subjected to personal property taxes in six of the seven other states through which they fly.

But if petitioner's airplanes, which are taxable for some portion of their value in each of the states in which they carry on interstate transportation over fixed routes and regular schedules, are also taxed for their full value by Minnesota, the state of the domicile, it is evident that merely because they are engaged in interstate commerce they may be subjected to multiple state taxa-

tion far in excess of their value, and far beyond any tax which any one of the states concerned could under its established system of taxation impose on vehicles whose movements are confined within its territorial limits. It is a scheme of property taxation on which, so far as the decision now rendered gives us any hint, the commerce clause sets no restriction, but which is so burdensome in its operation as compared with the taxes imposed on intrastate vehicles that few interstate carriers could support it and survive economically.

The case thus sharply presents in a new form the old question whether the commerce clause affords any protection against multiple state taxation of the physical facilities used in interstate transportation which, because they move from state to state, are exposed to full taxation in each, save only as the due process and commerce clauses may prevent. Although the question is new in form it is old in substance and this Court has considered it so often in other but similar relationships that the answer here seems plain.

Of controlling significance in this case are certain elementary propositions, so long accepted and applied by this Court that they cannot be said to be debatable here, although they seem not to have been taken into account in deciding this case either here or in the Minnesota Supreme Court. The first is that the constitutional basis for the state taxation of the airplanes, which are chattels, is their physical presence within the taxing state, and not the domicile of the owner. *Union Transit Co.* v. *Kentucky, supra*; *Johnson Oil Co.* v. *Oklahoma; supra,* 161-2 and cases cited. In this respect, as this Court has often pointed out, the taxation of chattels rests on a different basis than does the taxation of intangibles, which have no physical situs and may be reached by the tax gatherer only through exertion of the power of the state over the person of those who have some legal interest in the intangibles. *Union Transit Co.* v. *Kentucky, supra,* 205-6; *Schwab* v. *Richardson,* 263 U. S. 88, 92; *Frick* v. *Pennsylvania,* 268 U. S. 473, 494; *Blodgett* v. *Silberman,* 277 U. S. 1, 16-18; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 209-10; *Curry* v. *McCanless,* 307 U. S. 357, 363-6; *Graves* v. *Elliott,* 307 U. S. 383; *Graves* v. *Schmidlapp,* 315 U. S. 657; *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174.

A state may, within the Fourteenth Amendment, tax a chattel located within its limits, although its owner is domiciled elsewhere,

Brown v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517; *Pullman's Car Co.* v. *Pennsylvania, supra*; *Old Dominion S.S. Co.* v. *Virginia, supra.* But due process precludes the state of the domicile from taxing it unless it is brought within that state's boundaries. *Delaware, L. & W. R. R.* v. *Pennsylvania*, 198 U. S. 341; *Union Transit Co.* v. *Kentucky, supra*; *Frick* v. *Pennsylvania, supra*, 489 *et seq.* It is plain then that for present purposes, and so far as the Fourteenth Amendment is concerned, respondent's airplanes, which are chattels regularly moving over fixed interstate routes, are subject in some measure to the taxing power of every state in which they regularly stop on their interstate mission.[1]

In some instances it may be that vehicles of transportation moving interstate are so sporadically and irregularly present in other states that they acquire no tax situs there, *Hays* v. *Pacific Mail S.S. Co.*, 17 How. 596; *St. Louis* v. *The Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, and hence remain taxable to their full value by the state of the domicile because they are not taxable elsewhere, *New York Central R. R. Co.* v. *Miller, supra*; *Southern Pacific Co.* v. *Kentucky, supra.* But that is not the case as to any of the planes here involved. And our decisions establish that, except in the case of tangibles which have nowhere acquired a tax situs based on physical presence and for that reason remain taxable at the domicile even if never present there, the state's power to tax chattels depends on their physical presence and is neither added to nor subtracted from because the taxing state may or may not happen to be the state of the owner's domicile.

We need not consider to what extent the due process clause limits the taxing power of each state through which airplanes or other vehicles of interstate transportation pass, to the taxation of part only of their value, fairly related to their use within the state, or precluded the Minnesota Supreme Court from extending to tangible property moving in more than one state the rule of *Curry* v.

[1] We need not consider here whether the jurisdiction of a state over air above it—as distinguished from the control of a private landowner over air above his land—affords a basis for taxation of planes which regularly fly over the state but do not regularly land within its borders. For in six of the seven states, other than Minnesota, over which petitioner's airplanes regularly fly, they also make regular scheduled landings. Plainly those states have jurisdiction to tax a proportionate part of their value and to that extent the judgment of the Minnesota Supreme Court, permitting taxation in full by the domicile, is erroneous, and the cause should be remanded for further proceedings.

McCanless, supra, and subsequent cases, permitting full taxation of intangibles by each state having a substantial relationship to the interest taxed. For we are dealing here with tangible instrumentalities of interstate commerce, entitled as such to the protection afforded by the commerce clause from unduly burdensome state taxation, even though the tax might otherwise be within the constitutional power of the state. And it is plain, as this Court has often held, that if one state may impose a personal property tax at full value on an interstate carrier's vehicles of transportation, and other states through which they pass may also tax them for the same tax period, the resulting tax would be destructive of the commerce by imposing on it a multiple tax burden to which intrastate carriers are not subjected.

This Court has never denied the power of the several states to impose a property tax on vehicles used in interstate transportation in the taxing state. It has recognized, as we have seen, that such instruments of interstate transportation, at least if moving over fixed routes on regular schedules, may thus acquire a tax situs in every state through which they pass. And it has met the problem of burdensome multiple taxation by the several states through which such vehicles pass by recognizing that the due process clause or the commerce clause or both preclude each state from imposing on the interstate commerce involved an undue or inequitable share of the tax burden. In *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 365, we recently considered "the guiding principles for adjustment of the state's right to secure its revenues and the nation's duty to protect interstate transportation." We declared that "The problem to be solved is what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions". And, in sustaining the tax, apportioned according to mileage, upon the entire property, including rolling stock, of an interstate railroad, imposed by Tennessee, the state of the owner's domicile, in which its principal business office and over 70% of its trackage was located, we said that the state could not "use a fiscal formula . . . to project the taxing power of the state plainly beyond its borders."

This Court has accordingly held invalid state taxation of vehicles of interstate transportation unless the tax is equitably apportioned to the use of the vehicles within the state compared to their use without, whether the tax is laid by the state of the domi-

cile or another.[2] Such an apportionment has been sustained when made according to the mileage traveled within and without the state, *Pullman's Car Co.* v. *Pennsylvania*, *supra*, 26, or the average number of vehicles within the taxing state during the tax period. *Marye* v. *Baltimore & Ohio R. R. Co.*, *supra*; *American Refrigerator Transit Co.* v. *Hall*, *supra*, 82; *Union Refrigerator Transit Co.* v. *Lynch*, *supra*.[3]

But if the tax is laid without apportionment or if the apportionment, when made, is plainly inequitable so as to bear unfairly on the commerce by compelling the carrier to pay to the taxing state more than its fair share of the tax measured by the full value of the property, this Court has set aside the tax as an unconstitutional burden on interstate commerce, whether it be in form on the rolling stock, *Union Transit Co.* v. *Kentucky*, *supra*; *Union Tank Line Co.* v. *Wright*, *supra*; *Johnson Oil Co.* v. *Okla-*

[2] The rule, generally applied, that vessels are taxable only by the domicile, Hays v. The Pacific Mail S. S. Co., 17 How. 596, 597; St. Louis v. Ferry Co., 11 Wall. 423, 430, 431-2; Morgan v. Parham, 16 Wall. 471, 475; Transportation Co. v. Wheeling, 99 U. S. 273, 279-80; Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 421; Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68, 69, 77, is no exception to these rules. For vessels ordinarily move on the high seas, outside the jurisdiction of any state, and merely touch briefly at ports within a state. Hence they acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all. See Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 23; Southern Pacific Co. v. Kentucky, *supra*, 75. The suggestion in the earlier cases, see Hays v. The Pacific Mail S.S. Co., *supra*, 600; St. Louis v. Ferry Co., *supra*; Morgan v. Parham, *supra*, that vessels were to be taxed exlusively at the home port, whether or not it was the domicile, was rejected in Ayer & Lord Tie Co. v. Kentucky, *supra*, and Southern Pacific Co. v. Kentucky, *supra*, and has never been revived. But where the vessels operate wholly within the waters of one state, they have been held to be taxable there, Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, and not at the domicile, Southern Pacific Co. v. Kentucky, *supra*, 67, 72, a result which, like the rule of apportionment in taxing railroad cars, avoids the burden of multiple taxation.

[3] Similarly taxes by the state of domicile or other states on the carrier's entire property including rolling stock have been sustained if apportioned according to mileage, Pittsburgh &c. Ry. Co. v. Backus, 154 U. S. 421; Adams Express Co. v. Ohio, 165 U. S. 194, 166 U. S. 185; American Express Co. v. Indiana, 165 U. S. 255; American Express Co. v. Kentucky, 166 U. S. 171; Wells, Fargo & Co. v. Nevada, 248 U. S. 165; St. Louis &c. Ry. Co. v. Hagerman, 256 U. S. 314; Southern Ry. Co. v. Watts, 260 U. S. 519; Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, or a combination of relevant factors, Rowley v. Chicago & N. W. Ry., 293 U. S. 102; Great Northern Ry. v. Weeks, 297 U. S. 135. Likewise gross receipts taxes, if properly apportioned or otherwise limited to receipts from business done within the state, have been upheld, Erie R. R. v. Pennsylvania, 21 Wall. 492; Maine v. Grand Trunk Ry. Co., 142 U. S. 217, as explained in Galveston, Harrisburg &c. Ry. v. Texas, 210 U. S. 217, 226; United States Express Co. v. Minnesota, 223 U. S. 335; Cudahy Packing Co. v. Minnesota, 246 U. S. 450; Pullman Co. v. Richardson, 261 U. S. 330; cf. New York, Lake Erie & W. R. R. v. Pennsylvania, 158 U. S. 431.

homa, supra, or on the carrier's entire property, *Fargo* v. *Hart*, 193 U. S. 490; or on a franchise or right to do business, *Allen* v. *Pullman Co.*, 191 U. S. 171; *Wallace* v. *Hines*, 253 U. S. 66; *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76; cf. *Norfolk &c. Ry.* v. *Pennsylvania*, 136 U. S. 114.

Upon like principles this Court has consistently held that a tax laid by a state on gross receipts from interstate commerce, which is comparable to a property tax at full value on vehicles of interstate transportation, violates the commerce clause unless equitably apportioned. *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298; *see Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 453-5; *Pullman Company* v. *Richardson*, 261 U. S. 330, 338-9. To the same effect as to capital stock taxes, see *Atchison &c. Ry.* v. *O'Connor*, 223 U. S. 280, 285 and cases cited.

In many the tax was held invalid although imposed by the state of the domicile of the taxpayer. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 342, overruling *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338; *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin White & Prince Co.* v. *Henneford*, 305 U. S. 434; see *Western Live Stock* v. *Bureau, supra*. The same rule is applied to the taxation by the domicile of goods carried interstate, *Case of the State Freight Tax*, 15 Wall. 232; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; and the taxation of goods in transit generally, *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469.

In *Galveston, Harrisburg, etc. Ry.* v. *Texas, supra*, 228, in which a tax on gross receipts of a railway engaged in interstate commerce was condemned because not apportioned, the Court declared, "Of course it does not matter that plaintiffs in error are domestic corporations". The like rule, applied to the taxation by the state of the owner's domicile of railroad property, including rolling stock, was approved in *Nashville, C. & St. L. Ry.* v. *Browning, supra*. And in *Bacon* v. *Illinois*, 227 U. S. 504, 511-12, the Court was at pains to point out that the power of a state to tax goods in transit is not affected by the fact that it is or is not the domicile of the owner. These cases clearly establish that, what-

ever relevance domicile may at times have to the power of a state under the due process clause to tax tangibles, it has none to the question whether the exercise of that power so burdens interstate commerce as to violate the commerce clause.

It cannot be said either in point of practicality or of legal theory that anything is added to Minnesota's power to tax by reason of the fact that all of petitioner's aircraft are registered with the Civil Aeronautics Authority with St. Paul, Minnesota, designated as their "home port". Section 501 of the Civil Aeronautics Act, 52 Stat. 1005, 49 U. S. C. § 521, requiring the registration with the Authority of aircraft, merely provides that a certificate of registration "shall be conclusive evidence of nationality for international purposes." Neither the statute nor the regulations adopted under it attach any other consequences to the registration of airplanes at a particular "home port". The much more detailed provisions of R. S. §§ 4141, 4178 as amended, requiring registration of vessels at a particular home port and the painting of the name of that port on the stern of the vessel, have been held irrelevant to state power to tax, even though the port of enrollment is also one at which the vessel regularly calls, *St. Louis* v. *The Ferry Co., supra*; *Ayer & Lord Co.* v. *Kentucky, supra*; see *Southern Pacific Co.* v. *Kentucky, supra*, 68, 73.

Nor is it of any significance for tax purposes whether Minnesota is "as a business fact the home state of the fleet". While the existence of a business domicile has been thought to afford a basis for the state taxation of intangibles, on the theory that they have become localized there, *Wheeling Steel Corp.* v. *Fox, supra*, 211, *et seq.*, the constitutional bases for the taxation of tangibles and of intangibles are, as we have seen, quite different, and under our decisions, to which we have referred, the only basis for the taxation of tangibles is their physical presence in the taxing jurisdiction. And even the taxation of intangibles of interstate carriers is subject to the rule of apportionment wherever the tax without it would subject the commerce to the burden of multiple state taxation. The "unit rule" for the taxation of interstate carriers applies to tangibles and intangibles alike and requires an equitable apportionment of the tax on both. *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 222, 226; 166 U. S. 185, 223-4, 225; *Fargo* v. *Hart, supra*, 499; *Oklahoma* v. *Wells Fargo & Co., supra*, 300; *Wallace* v. *Hines, supra*, 69-70; *Southern Ry. Co.* v. *Kentucky, supra*, 81.

Moreover, the difficulties of applying to aircraft a rule of taxation at a "home port" are essentially those which have led, long since, to the abandonment of the idea by this Court as applied to vessels. Compare *St. Louis* v. *The Ferry Co., supra*; *Ayer & Lord Tie Co.* v. *Kentucky, supra.* While it appears from the present record that petitioner maintains at St. Paul, Minnesota, its airplane and engine overhauling base, at which the principal repairs to planes and engines are made, it also operates maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle, Washington, at which points it maintains crews of mechanics and maintenance equipment. It owns and leases hangars and office space at all of its stopping points, each of which are manned by its employees. On the tax day, May 1, 1939, petitioner's planes made no scheduled stop in St. Paul. Thus a number of states have a physical relationship to petitioner's business — by reason of the movement of planes, over the fixed routes, the landing of planes, the maintenance and operation of repair and service equipment, landing fields, hangars, and office buildings, with their attendant employees — which, for practical purposes, is as substantial in nature as that claimed for Minnesota.

Even if we could say on this record that Minnesota and it alone can be regarded as the "home state", we have no assurance that in taxing planes operated by other and more complex business organizations, one state will have any greater claim to that designation than several others, and the court's opinion furnishes no test to guide in the choice among them, if choice has any relevance. Nor does it say that the power to tax vehicles of interstate transportation at the domicile or the "home port" is exclusive. Obviously, unless it is deemed to be thus exclusive it does not foreclose any state within which the planes move on fixed routes from imposing a like tax burden. And if it is deemed to be exclusive the other states must be denied their just claims to collect an equitable tax on property regularly used within them in carrying on an interstate business. North Dakota, for instance, in taxing the planes regularly landing within its borders, is not taxing rights originating in and safeguarded by Minnesota, or exercising any rights attributable to Minnesota. No reason appears why North Dakota should be denied the right to tax the planes to the extent that they are within its borders, or why, to that extent, Minnesota

has any relationship to them sufficient either to enable it to tax them or to preclude North Dakota from taxing them.

The taxation of vehicles of interstate transportation in a business organized and conducted as is petitioner's is as capable of apportionment, and the insupportable multiple tax burden on interstate commerce is as readily avoided by apportionment of the tax, as in the case of the taxation of tangible and intangible property of railroads, railroad car supply companies, express companies, and the like which we have repeatedly held to be subject to the rule of apportionment. To refuse now to apply the rule of apportionment to petitioner's airplanes, after a half century of its application by this Court as the means of avoiding prohibited multiple state tax burdens on vehicles of interstate transportation; to extend to airplanes moving interstate over fixed routes on regular schedules, the rule that intangibles may be taxed at the business domicile whether or not taxed elsewhere; and to revive the abandoned doctrine that vessels may be taxed in full at their home port, while rejecting the correlative rule that they are exempt from taxation elsewhere, is to disregard the teachings of experience and of precedent. It subjects a new and important industry to state tax burdens, essentially discriminatory in their effect on interstate commerce, to which other interstate carriers are not subject and which it was the very purpose of the commerce clause to avoid.

Respondent places its reliance on *New York Central R. R.* v. *Miller, supra.* There the Court sustained a franchise tax by the state of domicile including in its measure the full value of freight cars moving in and out of the state, often out of the taxpayer's possession for an indefinite time, and moving in the service of other roads on their independent business. The decision proceeded on the assumption, not tenable here but which the facts of that case were thought to support, that the cars were not shown to have moved so regularly or continuously in any state or group of states outside the domicile as to gain a tax situs there. The Court in distinguishing the case from *Pullman's Car Co.* v. *Pennsylvania, supra,* which sustained a state tax on a foreign railroad corporation, measured by the intrastate mileage of cars passing in and out of the taxing state, said (pp. 597-8):

"But in that case it was found that the 'cars used in this State have, during all the time for which tax is charged, been running

into, through and out of the State.' The same cars were continuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home."

The present case raises the question which the *Miller* case found it unnecessary to decide but which this Court has consistently answered by requiring the apportionment of a tax on vehicles of interstate transportation according to their regular use within and without the taxing state. In the *Miller* case it appeared that the cars moved not only over the carrier's own tracks, but also were interchanged with other railroads, and thus, as the Court pointed out, moved about almost at random throughout the United States. No evidence was offered tending to show in what states the cars moved, or with what degree of regularity they were present in any particular state or group of states other than New York. The Court was thus not called upon to consider whether New York could tax the cars if they moved between New York and other named states with such regularity that an "average of cars" could be said to be continuously so moving in those other states. Here, on the other hand, it is stipulated and found that all of petitioner's planes are "continuously engaged in flying from state to state in the course of [petitioner's] operations" and that those operations are on regular schedules along fixed routes through eight states. The total mileage of regular routes and the total daily mileage on those routes both in Minnesota and outside are definitely stipulated and found. Hence there is no warrant for saying that their presence in each of the states through which they pass is not as regular and continuous in nature as it is in Minnesota. These findings establish that, while no particular plane is permanently within any state, its planes are continuously flying in, and an average number or a percentage of the total is regularly, i. e., "permanently" within, each of the states through which they

pass. Here, as was the case in *Pullman's Car Co.* v. *Pennsylvania, supra,* the same planes are "running into, through, and out of" each of the states along petitioner's routes and an "average" of planes is continuously within each of those states.[4]

We are not now concerned with the proper apportionment of taxable values among the states outside the state of Minnesota. Since the movement of the planes, wherever they go, is over fixed routes and on regular schedules, they acquire a tax situs outside Minnesota to the extent that they do not move within it. Hence the extent to which they move in and are taxable by one state outside Minnesota rather than another is irrelevant. It is enough that the Minnesota tax is for full value and that Minnesota's fiscal formula imposes a prohibited burden on interstate commerce because it is used "to project the tax power of the state plainly beyond its borders", to reach instruments of interstate commerce which are taxable elsewhere, and that the extent of that projection may be measured by comparing either the plane or the route mileage over fixed routes in Minnesota with like mileage over fixed routes in the states outside Minnesota.

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[4] It is true that here there is no evidence of the average number of planes present within Minnesota or any other state during the tax year. But where the movement through the state is regular and continuous, as it is here and was not in the *Miller* case, apportionment may be made by showing the plane mileage or route mileage within and without the state. Pullman's Car Co. *v.* Pennsylvania, 141 U. S. 18; Nashville C. & St. L. Ry. *v.* Browning, 310 U. S. 362, and cases cited. The Minnesota court here did not rest its decision on the ground that petitioner had sought to apportion by mileage instead of by average number of cars, and had introduced no evidence to support the latter type of apportionment. If it had it might well have remanded the cause to permit any deficiencies of proof to be remedied. It held rather that regardless of the nature of proof of apportionment Minnesota, as the state of the domicile, could tax the cars for their entire value.

In this respect also the case is unlike the *Miller* case. There, as the record reveals, the carrier's evidence showed only the car mileage within and without the state, and its owned track mileage within and without the state. But since the cars moved over irregular routes without fixed schedules, car mileage afforded no basis of apportionment, without proof also that the cars were present in particular states with sufficient regularity to acquire a tax situs there. Owned track mileage likewise failed to afford a basis of apportionment, in the absence of some proof that the tracks were regularly used by the cars in question. Nor did the carrier lack opportunity to make fuller proof. The cause as it came here involved five successive tax years, as to each of which the carrier was afforded a hearing with opportunity to introduce evidence. The carrier having failed despite this repeated opportunity to introduce evidence which would, on any theory of apportionment, support a conclusion that any particular proportion of cars had acquired a tax situs elsewhere, this Court, as it pointed out, was not called upon to apply the rule of Pullman's Car Co. *v.* Pennsylvania, *supra,* or to consider whether, consistently with the commerce clause, property used as an instrumentality of commerce may be subjected to the risk of double taxation.

Both before and since the *Miller* case this Court has ruled that vehicles of interstate transportation regularly moving to and from the state of domicile from and to other states acquire a tax situs in the latter, and that the state of domicile cannot constitutionally levy on them an unapportioned property tax. *Union Transit Co.* v. *Kentucky, supra; Johnson Oil Co.* v. *Oklahoma, supra; Nashville, C. & St. L. Ry.* v. *Browning, supra.* In *Johnson Oil Co.* v. *Oklahoma, supra,* 161-2, where the cars moved from and to Oklahoma to and from various states including Illinois, the state of domicile, we declared that the cars had acquired a tax situs outside Illinois and were to that extent not taxable by Illinois. The court rested its decision on the rule, stated without qualification, that "When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States."[5] Those cases should control now. For here we are confronted with a scheme of taxation imposed on vehicles of interstate transportation located within the taxing state for only a limited and specified part of their active life. For the rest, they are in other states, moving over fixed routes of travel where, under our decisions, they plainly have a tax situs, and where they are in fact taxed in six of the seven states other than Minnesota through which they pass.

[5] In Union Transit Company *v.* Kentucky, 199 U. S. 194, it appeared that the cars of the Transit Company, the taxpayer, moved in and out of Kentucky, the state of domicile. The Transit Company disclaimed on the record any effort to prove that it had any cars which never came within the state, and sought to establish the number "permanently located" outside it only by proof of gross earnings within and without the state. In holding that the state of domicile could not tax tangible personal property "permanently located in other states" (p. 201), it is clear that the Court was limiting the taxing power of the state of domicile to the extent that the cars moving between Kentucky and other states had, under the rule of apportionment, gained a tax situs outside the state because they were "located and employed" there (p. 211). This is evident from its citation (p. 206) of Pullman's Car Company *v.* Pennsylvania, 141 U. S. 18, and American Refrigerator Transit Company *v.* Hall, 174 U. S. 70, as cases involving property "permanently located" in the taxing states. Both cases involved rolling stock continuously moving into and out of the taxing state and sustained taxes upon a proportion of the carrier's total rolling stock based respectively upon the track mileage or upon the average number of cars used within the taxing state. Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state (pp. 202, 211).

The tax now sustained is so obviously disproportionate to the protection afforded to the taxed property by the taxing state as to place a constitutionally intolerable burden on interstate commerce. But it is a burden which is capable of equitable adjustment which would satisfy constitutional requirements by the application of the principles of apportionment which this Court has repeatedly sanctioned, and which it is the constitutional duty of the State of Minnesota to apply. The application of these principles does not call for mathematical exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside. But a reasonable attempt must be made to tax only so much of the value as is fairly related to use within the taxing state. *Union Tank Co. Line* v. *Wright, supra,* 282; *Great Northern Ry.* v. *Weeks, supra,* 144; *Nashville C. & St. L. Ry.* v. *Browning, supra,* 365.

It is no answer to suggest that the states other than Minnesota have not asserted their constitutional power to tax or that we do not know how or to what extent they have exercised it. The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do. The jurisdiction of Minnesota to tax "must be determined on a basis which is consistent with the like jurisdiction of other states." *Johnson Oil Co.* v. *Oklahoma, supra,* 162. Minnesota cannot justify its imposition of an undue proportion of the total tax burden which can be imposed on an interstate carrier by saying that other states have taken or may take less than their share of the tax. It is enough that the tax exposes petitioner to "the risk of a multiple burden to which local commerce is not exposed", *Adams Mfg. Co.* v. *Storen, supra,* 311; *Gwin, White & Prince, Inc.* v. *Henneford, supra,* 439, and cases cited. To hold otherwise would be to measure Minnesota's power to tax, not by constitutional standards, but by the action of other states over which neither Minnesota nor petitioner has any control and to leave petitioner's tax to be measured from year to year, not according to any legal standard, but by the unpredictable uncontrolled action of other states.

The judgment should be reversed and the case remanded for further proceedings in the course of which the state court would

be free, if so advised, to inquire to what extent, if at all, the tax may, in harmony with state law, be apportioned in conformity to principles heretofore announced by this Court, and to that extent sustained.

Mr. Justice ROBERTS, Mr. Justice REED, and Mr. Justice RUTLEDGE join in this dissent.